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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 715

IN THE MATTER

of

The Petition of REDERI A/S HENNESEID, as Owner of the Motor Vessel "AAKRE," in a cause of exoneration from or limitation of liability.

CHARLES I. WATERMAN, *et al.*,
Petitioners,

v.

Steamship "AAKRE," REDERI A/S HENNESEID, LAMPORT & HOLT LINE, LTD., and CONTINENTAL GRAIN COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

D. ROGER ENGLAR,
T. CATESBY JONES,
F. HERBERT PREM,
Proctors for Charles I. Waterman, et al., Petitioners.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Charles I. Waterman, *et al.*, libelants in an action for loss of and damage to their cargo on board the Norwegian Motorship "Aakre," and claimants in a proceeding for limitation of liability filed by the owner of that vessel, for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, respectfully shows:

Jurisdiction of This Court

This is a proceeding in admiralty which was initiated by libels filed by your petitioners in the United States District Court for the Southern District of New York against the Norwegian Motorship "Aakre," her owners and charterers, for loss of and damage to her cargo while being transported from St. John, New Brunswick, to Buenos Aires, Argentina, by reason of the stranding of the vessel in the Bay of Fundy, during the early morning of October 29, 1937. Thereafter, the owners of the vessel filed a petition for limitation of their liability, and the two proceedings were consolidated by order of court.

This petition seeks a review of the action of the Circuit Court of Appeals for the Second Circuit in affirming, by a divided court, the decree of the United States District Court for the Southern District of New York, dismissing the libels and granting the shipowner complete exoneration from liability in the limitation proceedings. The date of the Order for Mandate, which is the decree sought to be reviewed, is August 16, 1941 (R. 1462).

The jurisdiction of this Court is invoked under Article 3, Section 2, clause 1 of the Constitution of the United States, and under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938; U. S. Code, Title 28, sec. 347).

Opinions Below

The opinion of the District Court is officially reported as *The Aakre*, 31 F. Supp. 8, and is printed in the record at pages 1370-1405.

The opinion of the Circuit Court of Appeals is not yet officially reported but is unofficially reported in 1941 A. M. C. 1263, and is printed in the record at pages 1443-1462.

Statement of the Matter Involved

The "Aakre" was being operated as a common carrier. The issue as to her liability turned on the question whether the stranding was due solely to errors of navigation or whether unseaworthiness may have contributed to the loss.

As the facts are fully stated in the opinions below, they need only be very briefly summarized here. The "Aakre" sailed from St. John about 9 P. M. on October 28, 1937. The navigators of the vessel laid out a course which, if made good, would have carried her safely out of the Bay of Fundy, the mouth of which is about fifteen miles wide and fifty miles from St. John. After the vessel had proceeded on this course for some thirty miles, her engines were stopped for about three hours to make certain repairs, and during this period the vessel drifted with the current some four miles to the westward. While the engines were stopped the Third Officer, who was then on watch, saw what he believed to be Prim Point Light, which would only be visible from a position very much to the eastward of the vessel's intended course. He reported the matter to the Captain and the Captain sent for the Second Officer, who was permitted under Norwegian law to act also as radio operator. The Second Officer had been asleep but on being called he obtained a radio bearing from St. John, which he correctly entered in the log book, but erroneously laid down on the chart. As stated by the Circuit Court of Appeals:

> "By this error the apparent position of the vessel was shown to be far east of its actual position, and the Third Officer's mistaken report of having sighted Prim Point Light was confirmed. Hence the Captain believed that he was east, instead of west, of his original course, and set the new 2:50 A. M. course accordingly" (R. 1445).

At 3:41 and 3:51 additional radio bearings were obtained which, as laid down on the chart, indicated that the vessel was dangerously near Northwest Ledge, a shoal on

the easterly side of the Bay, near the entrance. In order to avoid this supposed danger, the vessel was headed due West, and some twenty minutes later she stranded on a small island near Grand Manan, which is more than twenty miles from Northwest Ledge and on the opposite (western) side of the Bay of Fundy.

At the time of the stranding and for some hours before, the "Aakre" was surrounded by a dense fog.

The circumstances which led up to the stranding are summed up in the prevailing opinion of the Circuit Court of Appeals as follows:

> "The strange courses steered from 2:50 until 4:00 A. M., and from 4:00 until 4:20 A. M., are explained by the Captain's complete misunderstanding of his position" (R. 1445).

All magnetic compasses, when used on an iron or steel ship, are subject to deviation, which may be different on different headings of the ship and varies from time to time due to changes in the magnetism of the vessel. In order to rely upon his compass, a navigator must have complete and accurate knowledge as to its deviations on all courses.

By Royal Decree issued pursuant to the Norwegian Merchant Shipping Act of July 20, 1893, the "Aakre" was required to have the deviation of her compasses determined by daily observations whenever the weather permitted, and to have these observations recorded in a book kept for that purpose, known as the "compass book" (R. 1124-1126).

The navigators of the "Aakre" had made no attempt to comply with this statute. For some points of the compass the compass book contained no entries at all; for others it contained only one or two entries in the course of a year. Scattered throughout the log-books are entries showing numerous substantial changes in deviation of which there is no indication in the compass book. On the night of the disaster the navigators of the "Aakre" were not using the compass book, but a deviation card prepared some eighteen months before, which showed zero deviation on the course they had set. In reliance on this card they made

no allowance for deviation although the District Court found that there was, in fact, a substantial deviation of the compass which was one of the factors setting the vessel over to the westward (R. 1393).

The Decisions Below

Both of the lower courts accepted the testimony of the master that the information which he had about his compass was "sufficient for safe navigation," although it was not what the statute required either in form or substance. The District Court held that the stranding was due to the error of the Second Mate in laying down the radio bearings from St. John, and therefore dismissed the libels and granted the shipowners complete exoneration in the limitation proceeding. The Circuit Court of Appeals, Judge Frank dissenting, affirmed this decision.

The Issue Presented

This case presents the question what legal consequences flow from the violation of the Norwegian statute, and whether the rule laid down by this Court in *The Pennsylvania,* 19 Wall. U. S. 125, 136, is still law in the Second Circuit. Under that rule a vessel which is involved in an accident while violating a statutory provision intended to prevent such accidents, has the burden of showing not only that the violation probably was not one of the causes of the accident "but that it could not have been." The rule in question, commonly referred to as "the rule in *The Pennsylvania,*" has been cited and followed in more than a hundred reported cases. It has very recently been applied according to its original terms by the Circuit Courts of Appeals for the First and Ninth Circuits. In the very recent case of *The Denali,* 105 F. (2d) 413, 418, the Circuit Court of Appeals for the Ninth Circuit, quoting the language of its previous decision in the case of *The Princess Sophia,* 61 F. (2d) 339, 347, referred to the rule as imposing

a "penalty" on the violator of the statute. We quote from the opinion as follows (p. 418):

> "'Failure to obey a statute does, indeed, penalize the violator. The penalty, however, is not that the violator is to be held accountable for any mishap, regardless of its relation to the violation. The rule simply is that the violator is penalized with the burden of showing that the violation not only probably did not cause the accident, but that it could not have done so. *This burden it is frequently extremely difficult, if not impossible, for the violator to discharge, in the nature of things; and therein lies the true penalty imposed upon him.*'" (Italics in original.)
>
> *The Denali*, 105 F. (2d) 413.

A rehearing was subsequently granted in *The Denali*, but after a full reargument the court adhered to its original decision, filing a supplemental opinion. 112 F. (2d) 952. An application was then made to this Court for a writ of certiorari, which was denied.

> *Alaska Steamship Co.* v. *Pacific Coast Coal Co.*, 311 U. S. 687, 61 S. Ct. 65.

In the present case, however, the Circuit Court of Appeals declined to apply the rule of *The Pennsylvania* and held that the rule, at least as originally stated, is no longer law. The court said:

> "Indeed, however *The Pennsylvania* rule was originally stated, the history of its application shows that it has done no more than shift the burden of proof with regard to causality" (R. 1450).

Judge FRANK filed a dissenting opinion in which he said:

> "My dissent is based largely upon a difference of understanding as to the meaning of the rule laid down in *The Pennsylvania*, 19 Wall. 125, 136: In that, and succeeding cases, the Supreme Court has held that the federal courts, when sitting in admiralty, must regard the violation of a statute designed to prevent accidents as a peculiarly serious transgression" (R. 1452).

Judge FRANK's interpretation of *The Pennsylvania* rule is identical with that which has been adopted and applied uniformly in the other circuits throughout the United States.

In *The Pennsylvania,* this Court said:

> "The liability for damages is upon the ship or ships whose fault caused the injury. But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been" (p. 136).

The facts in *The Pennsylvania* case were that a sailing vessel navigating in a dense fog was in collision while ringing a bell when by statute she was required to use a fog horn. On behalf of the sailing vessel it was sought to show not only that the use of the bell did not contribute to the collision but that, in fact, a bell was more effective than a horn. On that point this Court said:

> "To go into the inquiry whether the legislature was not in error—whether in fact a bell did not give notice to the steamer that the bark was where she was as soon as a foghorn would have done—is out of place. It would be substituting our judgment for the judgment of the law-making power. It would be admitting the validity of an equivalent for that which the statute has made a positive requirement. Then how can it be shown on the part of the bark that the failure to use a foghorn certainly contributed in no degree to the collision? How can it be proved that if a foghorn had been blown those on board the steamer would not have heard it in season to have enabled them to check their speed or change their course, and thus avoid any collision?" (p. 137).

The principle laid down by this Court in *The Pennsylvania* has been repeatedly reaffirmed in this Court, and

followed in the lower federal courts. Although *The Pennsylvania* was a collision case, the rule which it laid down is not limited to collision cases. *Richelieu & Ontario Nav. Co.* v. *Boston Ins. Co.*, 136 U. S. 408, 422, 423, 10 S. Ct. 934, 34 L. Ed. 398; *The Denali*, 105 F. (2d) 413, 418; 112 F. (2d) 952, 955 to 958. It applies to foreign vessels, including Norwegian vessels. *Lie* v. *San Francisco & Portland S. S. Co.*, 243 U. S. 291, 298.

In accepting the Captain's opinion as against the requirement of the statute, the lower courts did exactly what this Court said it could not do in *The Pennsylvania*, namely, they substituted their own judgment for that of the law-making power.

Moreover, the Circuit Court of Appeals rejected the "Pennsylvania" rule on still another ground, namely, that however the rule may have been originally stated,

> "its application shows that it has done no more than shift the burden of proof with regard to causality" (R. 1450).

In addition to being squarely in conflict with the decisions in the Ninth Circuit to which we have referred, this decision is squarely contrary to numerous decisions of this Court, and to a uniform line of decisions in the other circuits. The statement that the rule of *The Pennsylvania* merely shifts the burden of proof, is contrary to the express language of the rule. The rule is that the shipowner must prove not merely that his fault "probably was not" one of the causes of the disaster, "but that it could not have been." If the shipowner merely has the burden of proof, he sustains it by proving that his fault "probably was not" a contributing cause. Accordingly, the decision of the Circuit Court of Appeals nullifies the entire doctrine. Moreover, a common carrier always has the burden of explaining and excusing the loss of goods entrusted to him. *Clark* v. *Barnwell*, 12 How. 272, 279, 280; *Schnell* v. *The Vallescura*, 293 U. S. 296, 304, 305. As this Court said in the case last cited,

> "The reason for the rule is apparent. He is a bailee entrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability" (p. 304).

Hence, as whittled down by the Circuit Court of Appeals, the rule of *The Pennsylvania* adds nothing to the ordinary rules of evidence in cases of cargo damage, and therefore, in effect, disappears as a rule of law.

The present is a case in which the rule of *The Pennsylvania* is of peculiar importance. When no heavenly bodies are visible, the navigators of a vessel can only be guided:

(1) by her compasses,

(2) by the observation of shore lights or other aids to navigation, and

(3) by radio bearings.

The lower courts have found that the lights were erroneously observed by those on the "Aakre," and that the radio bearings were improperly entered on the chart. What of the compasses? If the master had complied with the Norwegian statute and had a compass book which correctly showed the deviations of the compasses on all headings, as contemplated by the statute, how is it possible to say that he would not have accepted his dead reckoning position as correct, in which event he would have passed safely out of the Bay of Fundy? Who can say that if the "Aakre's" navigators had been in possession of complete and accurate deviation data they would not have used it and relied upon it?

In the present case the "Aakre" stranded while violating a statute designed to prevent strandings. Specifically, the statute was designed to keep the master accurately informed of the vessel's position, and the vessel stranded because he was ignorant of her position. Under these circumstances mere proof of other faults which also contributed to his misunderstanding of his position, does not meet the burden imposed by the rule of *The Pennsylvania.*

Judge FRANK's dissenting opinion deals fully with the points mentioned above. He discusses the origin and purpose of the "Pennsylvania" rule and points out that this rule, where it applies, necessarily qualifies the ordinary rules of evidence as to proximate cause. He calls attention to the statement by this Court in *The Pennsylvania* that a shipowner who has failed to comply with a statutory obligation must show that the resulting disaster "was in no degree occasioned by that failure"; and its indication in *The Martello,* 153 U. S. 64, 75, that the shipowner must prove that the statutory violation "could not by any possibility have contributed • • •." We can add nothing to Judge FRANK's discussion of the legal principles involved, and no point would be served by our repeating it in different and probably less appropriate language.

As to the reason for the rule and the importance of it, Judge FRANK has this to say:

> "Cargo has a slim chance at best for it must rely exclusively on the testimony of the ship's officers and crew as to what preceded the casualty; and admiralty courts have often recognized that such witnesses almost invariably will testify on behalf of their ship. See cases collected in Moore, *Facts* (1908) Sections 8, 501, 523, 1021, 1110; *Cf.* Coxe *Admiralty Law,* 8 Col. L. Rev. 172, 181 (1908). Moreover, it is salutary that our courts should do what they can to see to it that legislation like the Norwegian statute is obeyed" (R. 1454).

We believe that the foregoing is but another way of stating what this Court had in mind when it said in *The Pennsylvania,* 19 Wall. 125, 136:

"Such a rule is necessary to enforce obedience to the mandate of the statute."

Reasons for the Allowance of the Writ

1. *The decision in this case creates a square conflict between the Second Circuit and the other federal circuits with respect to the rule of The Pennsylvania which has long been a fundamental rule for the determination of controversies arising out of marine disasters.*

The rule of *The Pennsylvania* has been cited and repeatedly applied not only by this Court but in scores of cases in the lower federal courts, and, until the present case, no doubt has ever been cast on its validity. The present decision abolishes the presumption created by the rule and substitutes a mere burden of proof, which would exist in any event, regardless of any violation of statute. If the present decision is allowed to stand, the law in the Second Circuit will be contrary to the law applied in the other Circuits, as well as contrary to the law as repeatedly laid down by this Court.

We have already cited and quoted from the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of *The Denali*. That decision affords a striking example of the confusion which will exist in the admiralty law if the decision of the Circuit Court of Appeals for the Second Circuit in the present case is allowed to stand. Many other cases can be cited to the same effect. The following are a few of the cases in which the "Pennsylvania" rule has been cited and applied by Circuit Courts of Appeals in the same terms in which the rule was originally laid down by this Court:

The First Circuit

General Seafoods Corporation v. *J. S. Packard Dredging Co.*, 120 F. (2d) 117, 120 (decided April 17, 1941).

THE THIRD CIRCUIT

The Duquesne, 262 F. 1, 5. *The Teaser*, 246 F. 219, 222, 223.

THE FOURTH CIRCUIT

The Cyrene, 85 F. (2d) 935, 937. *The City of Baltimore*, 282 F. 490, 493.

THE FIFTH CIRCUIT

Johnson v. *United States*, 4 F. (2d) 102, 103.

THE SIXTH CIRCUIT

Dorrington v. *City of Detroit*, 223 F. 232, 244, 245. *Pittsburgh S. S. Co.* v. *Duluth S. S. Co.*, 222 F. 834, 835, 836.

The rule laid down in *The Pennsylvania* has been cited and applied by this Court in a number of its own later decisions. In *Belden* v. *Chase*, 150 U. S. 674, 699, this Court said:

> "And it is the settled rule in this court that when a vessel has committed a positive breach of statute, she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so. *The Pennsylvania*, 19 Wall. 125, 136; *Richelieu Navigation Co.* v. *Boston Ins. Co.*, 136 U. S. 408, 422."

See also:

> *The Martello*, 153 U. S. 64, 74;
> *Lie* v. *San Francisco & Portland S. S. Co.*, 243 U. S. 291, 298.

We have already referred to this Court's recent denial of an application for a writ of certiorari in the case of

The Denali in which the Circuit Court of Appeals for the Ninth Circuit had applied the rule of *The Pennsylvania* and emphasized the peculiar burden which it imposes. 311 U. S. 687.

2. *The decision in this case will seriously prejudice the rights of persons killed or injured in marine disasters.*

While the present case involved no loss of life, it is important to bear in mind that the presumption laid down in *The Pennsylvania* applies equally to cases of death and personal injury, and is highly important in such cases. The average passenger is just as helpless as a cargo owner ashore, when it comes to combating the evidence of the shipowner's witnesses.

3. *The decision appealed from is an extreme case of judicial legislation, for it accomplishes by judicial decision what the legislative branch of the government has repeatedly declined to do.*

On September 23, 1910 there was signed at Brussels a Convention to govern the liabilities arising out of collisions between seagoing vessels. Article 6 of the Convention reads in part as follows:

> "There shall be no legal presumptions of fault in regard to liability for collision."[1]

This Convention was signed by the American delegates to the Convention with certain reservations, the third of which was as follows:

> "The provisions of Article 6 of said Convention shall not in any way affect legal presumptions created by the laws of the United States."[2]

The Convention has never been ratified by the United States, although efforts to have it ratified have been made from time to time. In January 1938, there were extensive hearings on it before a subcommittee of the Senate Committee on Foreign Relations. As a result of those hearings,

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[1] Senate Document, Executive K, 75th Congress, p. 11.
[2] Ibid., p. 15.

the Committee on Foreign Relations made a report approving the Convention, but making, among others, the same reservation with respect to Article 6 that was made by the delegates to the Brussels Convention.[1]

At the hearings above mentioned, a number of labor unions filed vigorous protests against the ratification of the Convention, directing their criticisms particularly at Article 6.[2] We quote as follows from the memorandum filed by the President of the National Organization of Masters, Mates and Pilots of America:

> "An even more serious objection to the convention arises from article 6 which provides that—
>
> 'There shall be no legal presumptions of fault in regard to liability for collision.'
>
> These words would add tremendously to the difficulty of establishing any claim for personal injury or loss of life arising out of a collision. It is usually impossible to prove with any certainty exactly how a collision occurs between two moving vessels. Most cases are decided on presumptions. These presumptions are based on practical rules which the courts have worked out over a long period of years. The fundamental principle is that if a vessel is shown to have been violating a rule of navigation at the time of the collision, it is presumed that she was guilty of a fault which contributed to the collision. Such presumptions are the greatest aids in simplifying the proofs and enabling the courts to work out a sound practical result. In my opinion a convention which does away with these presumptions will go a long way to deprive seamen and passengers of the benefits which were conferred on them by the recent amendments of the law governing limitation of liability.[3] Such a result would undoubtedly be very

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[1] Executive Report No. 4, 76th Congress, p. 4.

[2] Hearings on Executive K before the Subcommittee of the Committee on Foreign Relations, United States Senate, 75th Congress, 3d session, on January 10, 11, 12, 13 and 14, 1938, pages 439, 440, 444.

[3] Act of August 29th, 1935, c. 804, sec. 1; Title 46 U. S. C., sec. 183 (b).

> desirable from the standpoint of protection and indemnity underwriters, who insure the liability of the shipowners, as in many cases it would enable them to defeat meritorious claims for death and personal injuries merely because of the impossibility of obtaining the necessary proof under the new rules laid down by this convention. I am sure that if this feature of the convention were generally understood, it would arouse a storm of opposition from the American public."

It would indeed be an extraordinary result if the presumption arising from statutory fault, which has been successfully defended before the legislative branch of the government for more than 30 years, were to be abolished by judicial decision in the leading maritime Circuit of the United States,—and without the matter even being passed upon by the court of last resort.

4. *The decision below not only reduces the rule of The Pennsylvania to a mere burden of proof, but permits that burden to be met by evidence contradicting the statute.*

If the rule of *The Pennsylvania* is to be of any value it must not be permitted that witnesses, or even courts, substitute their own judgment for the statutory rule. A presumption so fragile that it can be destroyed by the mere statement of the person at fault that the procedure he followed or the equipment he had, although different from what the statute required, was just as good or even better, would obviously be of no value.

The rule of *The Pennsylvania* is especially important in connection with foreign vessels which are frequently permitted to sail with smaller crews and less adequate equipment than American vessels. The "Aakre" would have been unseaworthy under American law, because the wireless operator also acted as one of the deck officers (R. 676). Norwegian law, however, does not permit navigators to rely merely on radio bearings, but definitely requires them to have certain data by which to determine their position without reference to any aid from the shore. The decision

below permits foreign shipowners to take advantage of those features of their law which relieve them of burdens, and to ignore provisions which impose corresponding obligations.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Second Circuit commanding that court to certify and send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings of the case numbered and entitled on its docket, No. 17727, October Term, 1940,

"In the Matter

of

The Petition of REDERI A/S HENNESEID, as owner of the Motor Vessel 'AAKRE' in a cause of exoneration from or limitation of liability.

CHARLES I. WATERMAN, *et al.*,
Libellants-Claimants-Appellants,

against

Steamship 'AAKRE' and REDERI A/S HENNESEID, and LAMPORT & HOLT LINE, LTD.,
Respondents-Appellees,

and

CONTINENTAL GRAIN COMPANY, REDERI A/S HENNESEID,
Impleaded-Respondents-Appellees."

and that the decision of the said Circuit Court of Appeals rendered on the 28th day of July, 1941 (R., pp. 1443-1462) and the order entered on the 16th day of August, 1941 (R.,

p. 1462) be reversed and that your petitioners may have such other and further relief in the premises as may be just.

Dated, New York, October 24, 1941.

CHARLES I. WATERMAN, NEIL WATERMAN and EDMUND WATERMAN, copartners, doing business under the firm name and style of E. WATERMAN & Co.; JOS. PELUFFO Y CIA SOCIEDAD ANONIMA; MIGUEL PERSICO, LUIS CASA, FRANCISCO KASA, and FERNANDO MARZIALE, copartners, doing business under the firm name and style of CASA Y PERSICO; ALFREDO PARENTI; NICOLAS DANGIOLA ARCUCCI, ORLANDO DANGIOLA ARCUCCI, SALVADOR MAZZARELLA and MANUEL RICARDO VIGNALE, copartners, doing business under the firm name and style of DANGIOLA ARCUCCI Y CIA, CIA DE PRODUCTOS AGRICOLAS SOCIEDAD ANONIMA; ARTURO IDOYAGE MOLINA; ANTONIO GASPARRI, QUINTO GASPARRI, ENRIQUE GASPARRI, JOSE GASPARRI, EMILIO GASPARRI and ATILIO GASPARRI, copartners, doing business under the firm name and style of GASPARRI HERMANOS; EUGENIO SCUPPA and RAFAEL PASQUALINI, copartners, doing business under the firm name and style of SCUPPA Y PASQUALINI; GENARO CACACE, CARMELO CACACE and JOSE CACACE, copartners, doing business under the firm name and style of GENARO CACACE Y HERMANOS; GINO VUOTTO, MIGUEL VUOTTO and JOSE VUOTTO, copartners, doing business under the firm name and style of GINO VUOTTO E HIJOS; JUAN F. DE MENDONCA NUNES; ANDRES HERMINIO MASSIMINO; VINCENTE CARTABBIA; MIGUEL DI PACE and DOMINGO DI PACE, copartners doing business under the firm name and style of MIGUEL Y DOMINGO DI PACE; MARIANO VIVA and COSTANZO FEDERICO, copartners, doing business under the firm name

and style of VIVA Y FEDERICO; ANGEL RICCI and GUILLERMO RICCI, copartners, doing business under the firm name and style of RICCI HERMANOS; JOSE FERNANDEZ BELAEZ and JESUS MENENDEZ and MARCELINO BELAEZ, copartners, doing business under the firm name and style of FERNANDEZ MENENDEZ Y CIA; LUIS MANGINI; JOSE VIVO; SALVADOR TOSCANO; CASTILLO SPINA, JOSE SPINA, GUERINO SPINA, GENARO SPINA, MIGUEL SPINA and EDUARDO SPINA, copartners, doing business under the firm name and style of SPINA HERMANOS; JUAN JOSE CACACE, ROBERTO CACACE, RODOLFO CACACE, and SUCESION DE SALVADOR CACACE, copartners, doing business under the firm name and style of JUAN CACACE Y HNOS.; MARIO JUAN BAUTISTA COSTANTINI, JUAN BAUTISTA COSTANTINI, CARLOS JUAN BAUTISTA COSTANTINI, JUAN BAUTISTA COSTANTINI, and VITALO JUAN BAUTISTA COSTANTINI, copartners, doing business under the firm name and style of CASA LUIS COSTANTINI HIJOS DE LUIS COSTANTINI; JUAN MOSCARIELLO; and MCCAIN PRODUCE COMPANY, LTD.,

Petitioners,

D. ROGER ENGLAR,
T. CATESBY JONES,
F. HERBERT PREM,
Proctors for Petitioners.

PETITIONER'S

BRIEF

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No.

IN THE MATTER

of

The Petition of REDERI A/S HENNESEID, as Owner of the Motor Vessel "AAKRE," in a cause of exoneration from or limitation of liability.

CHARLES I. WATERMAN, *et al.*,
Petitioners,

v.

Steamship "AAKRE," REDERI A/S HENNESEID, LAMPORT & HOLT LINE, LTD., and CONTINENTAL GRAIN COMPANY,
Respondents.

BRIEF FOR PETITIONERS

The essential facts are stated in the petition.

The contract of transportation was governed by the Canadian Water Carriage of Goods Act (Court's Exhibit 1-A, offered at R. 1073, printed at R. 1320), which was incorporated in the bills of lading, and which, so far as this case is concerned, is identical with the United States Carriage of Goods by Sea Act, 1936: Title 46 U. S. C., Sections 1300-1315. Under these Acts, if the stranding was due solely to negligence in navigation, the carrier is exempt from liability. If, on the other hand, the stranding was caused or contributed to by unseaworthiness of the vessel,

the carrier is liable for the damage to cargo unless it can establish that due diligence to make the vessel seaworthy had been used up to and at the time of sailing.

The obligation to use due diligence to make the vessel seaworthy is non-delegable. *International Navigation Co.* v. *Farr & Bailey Manufacturing Co.*, 181 U. S. 218, 225, 226. *The Farr & Bailey* case arose under the Harter Act, but it has been held both in this country and in the English courts, including the House of Lords, that where the same language is used it will be given the same construction in the later Acts that was placed upon it in the Harter Act.

Spencer Kellogg & Sons v. *Great Lakes Transit Corporation*, 32 F. Supp. 520 (E. D. Mich., S. D.);

Gosse Millerd, Ltd. v. *Canadian Government Merchant Marine* (1929), A. C. 223;

Hourani v. *T. & J. Harrison*, 32 Com. Cas. 305.

POINT I

The decision in the present case is based directly upon the rejection of the rule laid down by this Court in *The Pennsylvania* which has become a basic principle of our maritime law and if the present case is allowed to stand it will create a serious conflict between the law as applied in the Second Circuit and the law as applied in the other circuits.

The importance of the principle involved in the present case is, we believe, sufficiently shown in our petition. We there pointed out, as evidence of the widespread reliance on the rule of *The Pennsylvania* by the federal courts, that this rule has been cited and applied more than a hundred times. Every one of these citations has been examined by one or more of the undersigned counsel, and no case has been found, excepting the present case, in which any doubt has been cast on the interpretation or validity of *The Pennsylvania* rule as originally stated by this Court. Having cited

in our petition the leading cases in six of the circuits, we think that no useful purpose would be served by citing in this brief the scores of additional cases which have applied the rule.

That the Circuit Court of Appeals denied the authority of *The Pennsylvania* rule as originally stated, sufficiently appears from the language of its opinion as quoted in the petition. We shall now point out that the lower court's remarks on this subject were not mere *obiter dicta,* or a mere quibble over terminology. On the contrary, the court's rejection of the rule of *The Pennsylvania* was a controlling factor in its decision. This clearly appears from the findings and conclusions of the courts below.

The Findings and Conclusions of the District Court

The decision of the District Court was devoted largely to issues of fact which are no longer open in this Court. We shall deal only with the findings which are material to the issue raised by this petition.

The District Court found as follows:

> "I find that the cause of the stranding of the 'Aakre' was entirely due to the error of navigation on the part of the second mate in erroneously laying out the bearing which he had received from St. John" (R. 1389).
>
> • • • • • •
>
> "Accordingly, due to my study of the facts as explained above in this opinion, I hold that the stranding of the 'Aakre' was exclusively due to errors of navigation in the respects above described, and that her stranding not only was not caused or contributed to by any unknown deviation in her compass or any failure, of which her navigators may have been guilty, to record all her compass deviations in her compass book, but, under the facts here shown, could not have been caused thereby" (R. 1401).

Notwithstanding the above findings, the District Court, after pointing out that the vessel had been carried to the westward of her course by the wind and current, found as follows:

> "Furthermore, as I have found that she had an *easterly* deviation not exceeding 3 degrees, that too was setting her to the westward, although her navigator was not conscious of it, because he had started his navigation without allowing for any deviation"* (R. 1393).

This is a definite finding that failure to allow for an existing compass deviation was one of the factors which carried the vessel toward the western side of the Bay, where she went aground. The record affords no explanation of the apparent inconsistency between this finding and the finding that the stranding was due exclusively to the error in laying out the radio bearing. The District Court appears to have taken the view that since the error in laying down the radio bearing was in itself sufficient to put the vessel ashore, all other contributing causes were irrelevant as a matter of law. We shall discuss this question in connection with the opinion of the Circuit Court of Appeals, which appears to have taken the same view. At this time we shall only point out that 3° is admittedly a material deviation (R. 331; R. 919); indeed, the Circuit Court of Appeals found that any deviation in excess of 1° is material (*infra*, p. 23).

The District Court held that the information which the navigators of the "Aakre" had was sufficient, although it was not what the statute required either in form or substance. In other words, the court did exactly what this Court said it could not do in *The Pennsylvania*.

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* This statement as to the effect of easterly deviation is correct. The apparent contradiction arises from the fact that the term "easterly" (or "plus") is applied to all deviation which if not allowed for will cause the vessel to make good a course to the right of her intended course; so that when she is headed on a southerly course, a so-called "easterly" deviation actually carries her to the westward.

The Decision of the Circuit Court of Appeals

The Circuit Court of Appeals did not adopt the finding of the District Court that the stranding was due "exclusively" to the error in laying down the St. John Radio bearing. On the contrary, it found that the Captain was first misled by the supposed sighting of Prim Point Light, and that the radio bearing merely confirmed him in his previous error (*supra*, p. 3). However, the court concurred in the finding of the District Court, that the stranding was due solely to errors of navigation.

As to the necessity for keeping complete and accurate records of compass deviations, and the neglect of this precaution on the "Aakre," the Circuit Court of Appeals said:

> "Appellants argued that logbook entries are practically useless because not easily accessible, and that good practice requires daily observations and regular entries in the compass book, at least of all observations showing as much as one degree's difference from the last recorded observation in the same sector. With this, all the expert witnesses and the court itself seemed to agree; and it is evident that the compass book lacked a record of some observations which it would have had if the practice had been strictly observed" (R. 1447).

As to the effect of the breach of the Norwegian statute, the court said:

> "Since we recognize that the compass book did not contain all the entries which good seamanship required, nothing is added to the argument by the proof of a Norwegian statute enjoining regular entries in the compass book. The materiality of its violation is disproved in exactly the same fashion, and as we have just stated" (R. 1448).

Thus, the court holds that a statute adds nothing to the ordinary requirements of good seamanship; and that the evidence required to disprove the materiality of a viola-

tion is exactly the same, whether the rule violated is statutory or not. This is a flat rejection of the rule laid down by this Court in the case of *The Pennsylvania.*

Dealing specifically with *The Pennsylvania* rule, the court said:

> "Much argument has been devoted to the rule in *The Pennsylvania,* 19 Wall. 125, 86 U. S. 125, 22 L. Ed. 148, which declares it to be incumbent upon a vessel shown to have been guilty of violating a statutory rule of navigation to prove that the violation *could not* have contributed to the ensuing collision" (R. 1450).
>
> • • • • • • •
>
> "Indeed, however *The Pennsylvania* rule was originally stated, the history of its application shows that it has done no more than shift the burden of proof with regard to causality" (R. 1450).

Having held that *The Pennsylvania* rule merely shifts the burden of proof the Circuit Court of Appeals goes on to say—

> "Still, if it were applied in the strongest sense conceivable, requiring the defaulting vessel to show that the inference of *non sequitur* was not only the most probable, but even the only possible, inference from the facts in evidence, appellants still could not succeed; for every point at issue in the case, including the captain's faith in his compass, was established by direct testimony" (R. 1450-1451).

Taken alone this might appear to be a finding of fact, which this Court would be unwilling to disturb. Elsewhere in the opinion, however, we find that the "direct testimony" to which the court refers is the Captain's own testimony that his information with respect to the compass was adequate, although not what the statute required. Referring to the argument made by these petitioners, the Court said:

> "This argument puts directly into issue the captain's state of mind—his belief in the accuracy of the compass and the sufficiency of the compass data, as well as the fact of the accuracy of the one and the sufficiency of the other. *The captain himself testified that* the Aakre's compass was the best he had ever used, and that *the compass data were 'sufficient for safe navigation'; and the trial court accepted this testimony* not only as true in fact, but also as a true statement of what the captain had always believed. This is a complete answer unless other facts are shown which make the captain's faith absolutely incredible." * (R. 1448).

It would be difficult to conceive a more complete negation of *The Pennsylvania* rule than appears in the foregoing quotation. Having admittedly violated the requirements of the Norwegian statute, which were designed to insure his accurate knowledge of his position, and having put his vessel ashore admittedly because he was ignorant of his position, the Captain says that the knowledge which he had, although not what the statute required, was "sufficient for safe navigation" and, therefore, his violation could not have contributed to the disaster; and the court accepts this testimony as sufficient to overcome the burden imposed by the rule of *The Pennsylvania.* Obviously nothing is left of *The Pennsylvania* rule if it can be met by such testimony. The danger of such evasion of the rule was clearly foreseen and guarded against by this Court when it declined to accept evidence to show "the validity of an equivalent for that which the statute has made a positive requirement" (*supra,* p. 7).

During the fifteen months preceding the disaster the compass book of the "Aakre" showed only one entry of deviation on the course on which she left St. John. The master of the vessel and the shipowner's expert both agreed that one such entry was not an adequate guide to the deviation of the compass (R. 656, 657, 879), and the District

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* Italics ours.

Court made no finding on the subject. Nevertheless the Circuit Court of Appeals held that—

> "Since the compass book carried the particular entry necessary for this occasion, even a fairly general deficiency in the records could not have been material to the stranding" (R. 1447).

Under ordinary circumstances the Circuit Court of Appeals might have power to substitute its own judgment for the judgment of the expert witnesses—even where, as here, their testimony is unanimous and is contrary to the interest of their employer. In the present case, however, where a statutory violation is involved and the rule of *The Pennsylvania* applies, the court is substituting its own judgment not for that of experts, but for that of the Norwegian government. In view of the fact that the statute required complete and accurate records, it is not permissible for the court or anyone else to hold that "even a fairly general deficiency" in the records which the statute required "*could not* have been material to the stranding." In doing so the court did precisely what this Court held in the cases of *The Pennsylvania* and *The Martello* it had no right to do, *i .e.,* substitute its own judgment for that of the law-making power.

The court then goes on to say:

> "Furthermore, it is a sufficient answer to this charge, as to the former, that no possible error in the ship's course before the period of drifting could have affected her navigation afterwards, *and that three degrees' difference in her course after 2:45 A. M. would not have saved her from the effects of the captain's misconception of his position*"* (R. 1447-1448).

As appears from this passage in its opinion the Circuit Court of Appeals, like the District Court, took the view that even the unknown 3° deviation—which admittedly

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* Italics ours.

was one of the factors setting the vessel toward the western side of the Bay where she eventually went ashore, would not render the shipowner liable *unless this factor was sufficient to produce the stranding independently of any other factors involved.* We submit that this view is clearly unsound as a matter of law.

Where it appears that a fault has contributed to an accident, the injured party need not prove that in the absence of this fault the accident would not have occurred. Surely, a shipowner subject to the rule of *The Pennsylvania,* cannot dispose of a statutory fault which admittedly contributed to a disaster, merely by proving that he committed other very serious faults which would probably have caused the accident in any case.*

Throughout the opinion of the Circuit Court of Appeals it is apparent that the rule of *The Pennsylvania* was given no effect whatever. A striking illustration of this appears in the footnote on page 1449 of the Record, where the court recognizes the inconsistency in the Captain's testimony and says:

> "But on the trial there was no attempt to elicit a rationalization, of which he may have had several; and the matter, therefore, stood on his quite erroneous assumption."

The only meaning we can attach to this statement is that these petitioners are penalized because they did not attempt at the trial to elicit from the master some rationalization of his testimony. We submit that where *The Pennsylvania* rule applies, any inconsistency in the shipowner's evidence should be resolved against him rather than against the owners of cargo.

In connection with the language above quoted from the opinion in the present case, where the rule of *The Penn-*

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* Cf. this Court's requirement of proof that the violation "certainly contributed *in no degree*" (*supra,* p. 7). Italics ours.

sylvania was rejected, we call attention to the following passage from the opinion of the Circuit Court of Appeals for the Ninth Circuit in the case of *The Denali*, where the rule was applied:

> "The purpose of limiting the mates' watches is to avoid fatigue, and the burden is on the owner to show that the 4 hour excess of effort in violation of the statute *could not* have contributed to the miscalculation in the hour of anxiety and strain which brought the vessel's destruction.
>
> With this difficult burden of proof on the Steamship Company, it offers no testimony at all on the general health and surviving physical vigor of Obert, well past his middle age. More significant, the Steamship Company did not ask Obert, its own witness, nor did he testify, whether or not he felt fatigued from his 12 hours of service as both pilot and mate in the preceding 24 hours—*significant because every admiralty lawyer knows the heavy burden on his owner-client where a statutory command is violated in the navigation of its vessel*" (105 F. (2d) 413, 419)*

The contrast between these two opinions affords a good illustration of the confusion which will result if the decision in the present case is allowed to stand.

POINT II

The dissenting opinion of Judge Frank correctly interprets and applies the rule of *The Pennsylvania*.

In the preceding point we have dealt with this case on the basis of the actual finding that 3° of unknown deviation was a contributing factor in putting the "Aakre" ashore. We submit that this finding is sufficient to dispose of the case. Wholly apart from this specific finding, however, the rule of *The Pennsylvania* requires that the decision of the Circuit Court of Appeals be reversed.

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* Italics in first paragraph are in original opinion; italics in second paragraph are ours.

Although, as Judge FRANK points out (R. 1459), the Captain knew that the general set of the current was to the westward, the first radio bearing, as plotted by the Second Mate, indicated that the vessel was some eight miles to the eastward of her proper course, and more than thirteen miles eastward of her actual position (Exhibit J, U. S. Navy Chart, offered at R. 315; the chart is not reproduced in the Record but will be submitted to this Court pursuant to stipulation, R. 1432, 1435; R. 309, 310, 316, 317). The radio bearings taken at 3:41 and 3:51 as laid out by the Second Mate, showed the vessel more than twenty miles from her actual position. It is important to bear in mind that all of these radio bearings *were properly entered in the logbook,* although erroneously plotted on the chart. Therefore, all the Captain needed to do in order to discover and correct the Second Mate's error, was to compare the entry in the logbook with the bearing actually plotted on the chart. The error was so large (upwards of 20°, nearly 2 points) that it would have been obvious to any experienced navigator. Nevertheless the Captain accepted and acted upon the assumption that his vessel was many miles to the eastward of the course he had set, although the forces external to the vessel were setting her to the westward.

As Judge FRANK points out—

> "Even if the master had been only an amateur navigator, yet, looking at the course as originally charted by compass, and knowing that the drift was westward, he would have been shocked at the position shown according to the second mate's recording of the radio bearing—provided the master believed that the course originally charted by compass was reliable. Had he been thus shocked, he would have called for an explanation of the radio bearing as recorded. The result would have been that the second mate's error would have been detected—and the stranding would not have occurred. The violation of the statute is thus in the factual causal chain; and it could 'possibly have contributed' to the stranding" (R. 1457).

We shall not repeat Judge FRANK's reasoning, which is fully set forth in his opinion. We believe that there is no escape from the conclusion which he reaches, if the rule of *The Pennsylvania* is still law.

Where a vessel encounters disaster while violating a statute designed to prevent such disasters, we believe that the burden imposed by the rule of *The Pennsylvania* can be met in only one way, *i. e.*, by showing that the object of the statute was accomplished. For example, if the navigators of the "Aakre" had been using an accurate gyroscopic compass (which is not subject to deviation) they could properly argue that their violation of the Norwegian statute had not contributed to the disaster; for the purpose of the statute was to keep them accurately informed as to the ship's course, and they would have been accurately informed, although not in the manner contemplated by the statute. In the present case, however, where the disaster admittedly arose from "the Captain's complete misunderstanding of his position" (*supra*, p. 4), we submit that the shipowner may not shield himself behind the argument that the information which the statute required the Captain to have for his assistance in determining his position, would have been of no value. To say this is to contradict the statute, which this Court has said the shipowner may not do.

The majority of the court accepted the Captain's testimony that he considered his information about the compass "sufficient for safe navigation", and held that this testimony disposed of the argument that the Captain did not have confidence in his compass. We submit that such testimony is irrelevant; the courts cannot receive the judgment of an individual navigator as against the judgment of the law-making power. Moreover, the Captain's general statement that his compass data was sufficient for safe navigation must be read in connection with his frank statement that he would not attempt to proceed down the Bay of Fundy in fog without other aids to navigation in addition to his compass (R. 1032, 1033). It is clear from the

Captain's testimony that he considered his compass data sufficient only when supplemented by other sources of information such as shore lights, radio bearings, observations, etc. The requirement of the statute, however, is subject to no such qualification.

This Court has repeatedly recognized the importance of legislative provisions designed to promote safety at sea. In this connection we refer to the language used by this Court in *O'Hara* v. *Luckenbach S. S. Co.*, 269 U. S. 364, 368, 369. As there pointed out, a meticulous observance of statutory requirements may seem over-exacting while a vessel is navigating safely under normal conditions. These requirements, however, are intended for the protection of the ship and her company in time of emergency or peril; and when a ship meets disaster while violating a statutory regulation designed for her greater safety, every inference should be drawn against her.

"Such a rule is necessary to enforce obedience to the mandate of the statute." *The Pennsylvania*, 19 Wall. 125, 136.

POINT III

The decision below involves an exercise of legislative power for it changes the law of the United States to bring it more nearly into agreement with the law of Great Britain contrary to the clearly indicated intent of the Congress.

The rule of *The Pennsylvania* is a rule of evidence which does not affect the substantive rights of the parties. *The Denali, supra*, page 6. The courts of the United States apply this rule to the navigation of foreign vessels on the high seas.* In *Lie* v. *San Francisco & Portland S. S. Co.*, 243 U. S. 291, 298, the rule was applied to a violation of an

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* The waters of the Bay of Fundy more than three miles from shore are international waters and form part of the high seas (R. 495).

international convention by a Norwegian vessel on the high seas. In *Richelieu & Ontario Navigation Co.* v. *Boston Marine Insurance Co.*, 136 U. S. 408, 422, 423, the rule was applied to a violation of a Canadian statute by a Canadian vessel while navigating Canadian waters.

It was argued in the courts below that the rule of *The Pennsylvania* applies only in collision cases, but the *Richelieu & Ontario Navigation Co.* case and *The Denali*, 105 F. (2d) 413, 418, were both stranding cases; and in the latter case the authorities are fully reviewed and discussed in the opinion rendered by the Circuit Court of Appeals for the Ninth Circuit after reargument. 112 F. (2d) 952, 955 to 958.

In this connection it should be borne in mind that the present is a case in which a foreign shipowner has applied to our courts for limitation of its liability, thereby subjecting itself to our system of law, at least so far as remedies are concerned. This point is very strongly brought out by the opinion of this Court in the case of *The Titanic*, 233 U. S. 718, 732.

By reason of the fact that the rule of *The Pennsylvania* is applied in our courts to foreign vessels it is a matter of interest to shipowners abroad. In our petition we refer to the Brussels Convention of 1910, in which it was sought to abolish all legal presumptions of fault in collision cases. The United States Government has never ratified this Convention and the only Senatorial Committee which recommended its ratification coupled this recommendation with the same reservation made by the American delegates to the Brussels Convention, *i. e.*,

> "that the provisions of Article 6 of the Convention shall not in any way affect legal presumptions created by the laws of the United States."

The 1910 Convention has been ratified by the United Kingdom of Great Britain and Northern Ireland, and in the lower courts counsel for the shipowners cited a number of

English collision cases in support of their position. The English cases, however, rest squarely on the Maritime Conventions Act of 1911, by which the British government adopted and put into effect the principles of the Brussels Convention of 1910. Mardsen's Collisions at Sea (9th Edition) page 65; *The Heranger*, 1939 A. C. 94, 104.

But quite apart from the fact that the present British rule as to collisions is statutory, we call attention to the fact that Great Britain has always been primarily a carrier nation, and that the British law has always been more favorable to carriers than the law of the United States. *Railroad Co.* v. *Lockwood*, 17 Wall. U. S. 357, 373; *Knott* v. *Botany Mills*, 179 U. S. 69, 71; *Liverpool Steam Co.* v. *Phenix Insurance Co.*, 129 U. S. 397, 447.

In the petition we referred to the extended hearings on the Brussels Convention which were held in January, 1938. At those hearings the then head of the firm which represents the owners of the "Aakre" in this litigation, appeared in support of the Convention, acting on behalf of British and Scandanavian underwriters who insure the liability of shipowners.[1] Counsel for these petitioners appeared at the hearings in opposition to the Convention. One of the points most actively discussed was the rule of *The Pennsylvania*. Mr. J. Frank Staley appeared for the Department of Justice and, in the course of his testimony, he made the following statement:

> "Mr. Staley. The convention uses the expression 'Legal presumptions,' and it has been assumed all through it that the rule of the *Pennsylvania* would be classed as a legal presumption, and it being so classed that it would do away with it. If it is not classed as a legal presumption, then the situation may be different."[2]

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[1] Hearings on Executive K (cited in Footnote on page 14, *supra*) at pages 112, 113.

[2] Ib. page 312.

After the hearings the Senate Committee on Foreign Relations recommended that existing presumptions under American law be retained. What foreign interests could not obtain from the Senate they have now obtained from the Circuit Court of Appeals for the Second Circuit—*i. e.*, the abolition of the rule of *The Pennsylvania*.

We submit that if the United States are to adopt the principle of the Brussels Convention, and even extend it to cases other than collisions, they should do so by action of the United States Senate, after a full public hearing, and not by a court decision which abrogates, in one circuit only, a rule of evidence which has been consistently followed throughout the country for more than two generations.

CONCLUSION

Because the decision of the Circuit Court of Appeals is in direct conflict with the decisions of this Court and the Circuit Courts of Appeals for the First, Third, Fourth, Fifth, Sixth and Ninth Circuits; and because the decision affects an important principle of maritime law which has become a fundamental rule for the determination of controversies arising out of marine disasters, we respectfully submit that a writ of certiorari should be granted in order that the question presented herein may be definitely decided and the uniformity of the admiralty law restored.

Dated, New York, October 24, 1941.

Respectfully submitted,

D. Roger Englar,
T. Catesby Jones,
F. Herbert Prem,
Proctors for Petitioners.

NOV 22 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1941

No. 715

In the Matter

of

The Petition of REDERI A/S HENNESEID, as Owner of the Motor Vessel AAKRE, in a cause of exoneration from or limitation of liability.

CHARLES I. WATERMAN, et al.,
Petitioners,

v.

Motor Vessel AAKRE, REDERI A/S HENNESEID, LAMPORT & HOLT LINE, LTD., and CONTINENTAL GRAIN COMPANY,
Respondents.

BRIEF ON BEHALF OF RESPONDENT REDERI A/S HENNESEID

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Supreme Court of the United States

OCTOBER TERM, 1941

No. 715

In the Matter

of

The Petition of REDERI A/S HENNESEID, as Owner of the Motor Vessel AAKRE, in a cause of exoneration from or limitation of liability.

CHARLES I. WATERMAN, et al.,

Petitioners,

v.

Motor Vessel AAKRE, REDERI A/S HENNESEID, LAMPORT & HOLT LINE, LTD., and CONTINENTAL GRAIN COMPANY,

Respondents.

BRIEF FOR RESPONDENT REDERI A/S HENNESEID

Statement

The respondent opposes the application for a writ of certiorari herein. The only ground asserted in the petition is that the Circuit Court of Appeals for the Second Circuit has misapplied the so-called "rule of the *Pennsylvania*", 19 Wall. 125, and has rendered a decision in conflict with decisions in other circuits.

The respondent contends:

(1) that both the District Court and the Circuit Court of Appeals made findings of fact to the effect that the burden of proof imposed by the rule of the *Pennsylvania* had been sustained, and that this Court will not review such concurrent findings of fact. That is the short and simple answer to the application (pp. 6-9, *infra*);

(2) that while, as just stated, the decision of the Circuit Court of Appeals was based on the facts, it did not in its discussion misinterpret the *Pennsylvania*, nor is its decision in any respect in conflict with those of this Court or of other Circuit Courts of Appeals (pp. 14-17, *infra*);

(3) that, since the present case is concededly governed by the law of Canada, where the presumption referred to in the *Pennsylvania* does not exist, that presumption should not be applied here (pp. 17-19, *infra*).

The District Court wrote an unusually careful and exhaustive opinion (R. pp. 1370-1405). The majority of the Circuit Court of Appeals affirmed (R. pp. 1443-1451). Judge Frank, in his opinion (R. pp. 1452-1462), did not advocate reversal, but merely the return of the case to the District Court for some additional findings of fact. The additional findings suggested by Judge Frank appear to be covered, either by the findings already made or by the uncontradicted evidence of witnesses whom the District Court found to be truthful (pp. 9,14, *infra*).

The Facts

The Navigation.

The Aakre sailed from St. John at about 9 P. M. on October 28, 1937. Shortly before midnight, some engine difficulty occurred and the engines were stopped for three hours while repairs were made. During this three hours, the ship was drifting in the tides of the Bay of Fundy and

thick fog came on. She started her engines again at 2:50 A. M., at which time she was in dense fog.

Shortly before 2 A. M., just as fog and rain were closing in, the third officer saw in the distance a light, and thought that he counted the particular frequency of flashes peculiar to Prim Point light, on the easterly side of the Bay. In fact, he was too far away to have seen the light itself though, as the District Court found, he may have seen its reflection on the clouds. He noted the bearing of the light which he saw and drew it on the chart. The master, as the Circuit Court of Appeals found (R. p. 1445), was surprised at the position thus indicated (Oyan, pp. 222-224, 290-291), and he therefore directed the second officer to obtain a radio bearing from the radio station at St. John. Such a station, on receiving a ship's signal, determines the precise direction from which the signal comes, and then radios to the ship her exact true bearing from the radio station. On this occasion, the bearing was correctly transmitted and received, but was incorrectly laid out on the chart by the second officer, and thus an incorrect fix of the ship's position was obtained, indicating that she was on the eastern side of the Bay. This apparently confirmed the theory that the light which had been sighted was actually that of Prim Point. Because of this error, a course was set angling towards the western side of the Bay. After the vessel had run on this course for some time, radio bearings were secured again, but the same mistake was repeated, with the result that her position was thought to be in dangerous proximity to Northwest Ledge on the eastern side of the channel, although in fact she was near the western side. The situation appeared to be imminently perilous, and therefore the vessel was steered away from the supposed danger of Northwest Ledge, with the result that she stranded within about twenty minutes on Cheney Island.

It is extremely important to observe that the compasses had nothing whatever to do with these incorrect fixes of the vessel's position. A compass tells only the direction

of magnetic north. It does not tell anything about the direction in which a vessel may drift or about her actual position. Nor is the compass used in any way in taking radio bearings or in laying them off on the chart. The erroneous fixing of the vessel's position was not, and could not have been, based on any reading of the compass, because compasses do not give information of that character. The incorrect fixes were the result solely of the errors in laying off the radio bearings, and the courses which led to the stranding were set in reliance on those incorrect fixes. The compasses played no part in the matter and the Courts below so found.

The argument of the petitioners and also the doubts expressed by Judge Frank are based upon a conjecture that the master might have distrusted his compasses; that, if so, that might have been a factor in the mistake as to his ship's position; and that, unless the master considered the tides unpredictable, he might have determined the position by estimating the drift during the three-hour period, from the tidal predictions in the tide tables and from the current data on the charts. The petitioners seek to inquire into the master's state of mind regarding his compasses and regarding the possibility of determining the effect of the tides by dead reckoning. But the findings and the testimony below establish that the master did *not* distrust his compasses and was not willing to guess at his ship's position by trying to estimate the erratic currents of the Bay of Fundy, when he could obtain an accurate result by radio bearings. Besides, as already observed, compasses give no information about drift.

The question raised are questions of fact and they were decided adversely to the petitioners in both courts below.

The Compass Book.

Since the petition frequently refers to the compass book, a brief statement should be made of the method by which this book was kept. The purpose of a compass record is to inform the navigator of the deviations. If a man gets

ten deviations on a particular heading, all showing the same thing, there is no point in writing them all down in the compass book. Indeed, from the point of view of quick reference, it is better not to do so (Tvede, p. 943). On the *Aakre*, when weather permitted, deviation observations were taken always once a day and usually more, and the results were entered in the compass book if they were such as to change or modify the information already there; also the deviation was observed, if conditions made it possible, on each change of course (Oyan, pp. 208-211, 286, 287, 657; Knudsen, p. 356).

The Norwegian Regulations, to which cargo has referred, are merely administrative rules, made by the executive under statutory authority, requiring the officers and engineers of ships, under penalty, to keep certain records. The regulations impose no duty on the shipowner, except perhaps to supply the books, which was concededly done. They are not "a command" "directly from the statute to the vessel and her owner" as in the *Denali*, 105 Fed. (2d) 413 at 416. The only command is to the officers and the only penalty is on them. These regulations, which are printed at pages 1124-1127, nowhere require that every observation taken must be entered, and it is obvious that, on days when atmospheric conditions are not clear or when the ship is rolling heavily, the results of particular observations may not be accurate, and to enter them would be misleading.

With respect to the particular quadrant which is important in this case, the southwest, three observations on courses in that quadrant had been made and entered in the compass book within less than a month before the accident. The District Court found (pp. 1385, 1386) that the deviation records for that quadrant were sufficient and that "the recording of all the identic observations of deviation would not add anything to the information of the person seeking to navigate the Aakre." The majority of the Circuit Court of Appeals made similar findings, quoted pp. 7, 8, *infra*.

I

The findings of fact in the District Court and in the Circuit Court of Appeals.

The Courts below made findings:

(1) that the errors in fixing the ship's position were errors of navigation caused by the incorrect laying down of the radio bearings;

District Court, p. 1389:

> "I find that the cause of the stranding of the 'Aakre' was entirely due to the error of navigation on the part of the second mate in erroneously laying out the bearing which he had received from St. John."

Page 1400:

> "Consequently, I find that the navigation of the 'Aakre' on the night of the stranding is thus satisfactorily established beyond any reasonable doubt, and that the theories thereof advanced on behalf of cargo are wholly unsustainable."

Majority opinion of Circuit Court of Appeals, p. 1445:

> "By this error the apparent position of the vessel was shown to be far east of its actual position, and the third officer's mistaken report of having sighted Prim Point Light was confirmed. Hence the captain believed that he was east, instead of west, of his original course, and set the new 2:50 A. M. course accordingly."

Page 1446:

> "It is entirely futile for appellants to question that such apparently simple mistakes of navigation could have been made. The three stated radio bearings were certainly taken, and the ship's course was certainly laid as described. No other explanation of that course,

except the complete uselessness of the compasses, can be imagined. Appellants do not suggest this, or any alternative explanation. The compasses were shown to be accurate and reliable, the court found that they were, and appellants have not even made out a serious case to the contrary."

(2) that the compasses and the compass records had nothing to do with these mistakes or with the resulting stranding;

District Court, p. 1401:

"Accordingly, due to my study of the facts as explained above in this opinion, I hold that the stranding of the 'Aakre' was exclusively due to errors of navigation in the respects above described, and that her stranding not only was not caused or contributed to by any unknown deviation in her compass or any failure, of which her navigators may have been guilty, to record all her compass deviations in her compass book, but, under the facts here shown, could not have been caused thereby."

Majority opinion of Circuit Court of Appeals, pp. 1447, 1448:

"The court found, however, that adequate observations had been made, and, from the logbook entries, that the deviation in the southwest quadrant had never been greater than three degrees. Of this maximum deviation the navigator was apprised by an entry in the compass book September 30, 1937, showing a plus three-degree deviation on a course S 50° W; and if the navigator failed to make proper allowance for it the night of the accident, his error could not be attributed to lack of information. Since the compass book carried the particular entry necessary for this occasion, even a fairly general deficiency in the records could not have been material to the stranding. Furthermore, it is a sufficient answer to this charge, as to the former, that no possible error in the ship's course before the period of drifting could have affected her navigation afterwards, and that three

degrees' difference in her course after 2:45 A. M. would not have saved her from the effects of the captain's misconception of his position."

Page 1449:

"On the contrary, it has already been stated that the compass was shown to be highly accurate, and the compass book was shown to conform to ordinary requirements, at least in respect of the southwest quadrant. In other quadrants it was not radically deficient."

(3) that, however strictly the rule of the *Pennsylvania* may be applied, the respondent in fact sustained the burden of proof imposed thereby.

District Court, pp. 1401, 1402:

"I think it unnecessary for me to discuss or decide the juridical status before this Court in this cause of the Norwegian Statutes relied on by cargo. Because, even if they have the effect on the burden of proof for which cargo contends, and make the so-called Pennsylvania rule applicable, this is one of the rare cases in which the shipowner has sustained the heavy burden of proof laid on it by that rule, and has shown that, if there was any breach of said Norwegian Statutes or Rules, such breach not only did not but could not, under the facts here shown, have caused or contributed to the 'Aakre's' stranding."

Majority opinion of Circuit Court of Appeals, pp. 1450-1451:

"Still, if it were applied in the strongest sense conceivable, requiring the defaulting vessel to show that the inference of *non sequitur* was not only the most probable, but even the only possible, inference from the facts in evidence, appellants still could not succeed; for every point at issue in the case, including the captain's faith in his compass, was established by direct testimony."

It is a familiar rule that this Court will not review the concurrent findings of two lower Courts and, since the decisions below were based upon the facts and not upon any interpretation of the rule of the *Pennsylvania*, the petition should be denied on that ground.

II

The master had complete faith in his compasses, but considered it unsafe to try to fix his position, after drifting for three hours, by estimating the tides. Hence he used the highly accurate method of radio bearings.

1. The petitioners' argument and Judge Frank's doubts (R. pp. 1455, 1456) are based fundamentally on the erroneous conjecture that perhaps the master may have had little or no faith in his compasses, and Judge Frank suggests that the case be remanded for a further finding on this subject. The majority opinion in the Circuit Court of Appeals (pp. 1448, 1451) found squarely that the compasses were reliable and that the master believed them to be so. The District Court (pp. 1382-1384) found that the compasses were in good condition with proper directive force, well adjusted and reliable and (p. 1384) that the master "said that the compasses were very good". The uncontradicted evidence supports these findings. Captain Oyan had navigated the ship without difficulty on many voyages in the North and South Atlantic and the Mediterranean since leaving Sandefjord in March, 1936. A list of these voyages is in evidence as Exhibit D (pp. 1259-1261). He testified (pp. 210, 211) that he regularly checked the compasses against river ranges, etc., and that local pilots always found them correct, and continued:

> "Q. As a matter of fact, have you had any kind of trouble with your compass at all? A. No, no trouble at all.
>
> Q. Have you or have you not found it reliable to navigate with? A. Very reliable."

Page 230:

> "Q. Captain, did your compass or did any question of deviation or anything of that sort enter into this question of stranding at all or have anything to do with it? A. No, sir."

Page 1014:

> "Q. What is your opinion after having used the compasses as to their reliability? A. I have never seen on those ships I have been on better compasses.
>
> Q. How about the stability and directive force? A. They are very good.
>
> Q. Now, in your opinion as a ship master did you have on the ship when you sailed from St. John on the night of this stranding good compasses? A. Yes, sir.
>
> Q. And did you in your judgment have sufficient compass data for safe navigation? A. Yes, sufficient."

No more definite evidence on this subject could be given and the District Court paid high tribute (pp. 1386-1387) to the truthfulness of the Aakre's master and other witnesses. Hence it would seem that both the reliability of the compasses and the master's belief in it were clearly established, as the majority of the Circuit Court of Appeals found.

Judge Frank (p. 1456) says:

> "There is no doubt that the record contains much evidence that, on prior voyages, the course charted by compass had been strikingly inaccurate; evidence was offered by the ship to explain these facts, but the District Court made no finding, one way or another, with respect to them. Had he done so, I should be strongly inclined to follow his finding; I would now remand for that purpose. * * *"

He draws the conclusion, in the absence of such a finding, that perhaps the master did not trust his compasses. The reference is to evidence put in by the petitioners with

respect to several previous voyages. The petitioners selected certain days on which the ship's observed position was different from her dead reckoning position (ignoring the days when the contrary was true) and argued that these discrepancies were due to the compasses. Each one of these instances was fully investigated and shown to be due to winds, currents, etc. Judge Frank says that the District Court made no finding on this subject; he evidently overlooked the findings at page 1384 (fols. 1451, 1452), concurred in by the majority opinion of the Circuit Court of Appeals at page 1449, to the effect that these matters did not throw doubt on the compasses. On the contrary, the majority of the Circuit Court of Appeals (quoted p. 7, *supra*) found that the compasses were "accurate and reliable" and that the petitioners had "not even made out a serious case to the contrary". There is nothing here which discredits the master's testimony and the findings below that the compasses were in good condition and wholly reliable and that the master had full confidence in them.

2. Fog came on while the ship was drifting and, at the end of three hours, when she was ready to proceed, nothing whatever could be seen. The master obtained radio bearings to fix the vessel's position—a very accurate method. The petitioners seem to suggest that the master ought to have fixed the position by dead reckoning, based on the charts and current tables which he had on board; and Judge Frank suggests (p. 1458) that the case should be remanded for a finding as to whether the master considered the currents "unpredictable". The Aakre's master and officers testified fully on this subject (Oyan, pp. 289, 293, 296, 300, 1017; Knudsen, p. 400; Norberg, p. 453; Magnussen, p. 489). Their view that the currents are strong and uncertain, varying between one place and another, is supported by the official publications both of the United States and of Canada. The Nova Scotia Coast

Pilot, Ed. 1930, published by the United States Hydrographic Office, at page 53, contains the following:

> "The Bay of Fundy is deep, but the navigation is *not only difficult but dangerous* by numerous off-lying dangers guarding the approaches, *by rapid and uncertain tides, as well as by the frequent occurrence of dense fogs.*" (Italics ours.)

The supplement carrying it to 1937 contains no modification.

The Canadian Government's Tables of Currents in the Bay of Fundy, Exhibit EE, at page 7, contains the following:

> "*Special Note.*—The characteristic of the current which deserves special attention, is *the change found at points only a few miles apart.* The behaviour of the current is very regular and constant at any definitely fixed point; but *a change in position of even a few miles may make a marked difference in its character. This difference is chiefly in the strength* and in the time of slack water, and not so much in the direction. In passing islands, the strength may be very different indeed, according to the offing given; and in channels and passages there may be a difference, between the centre and the sides, of an hour in the time of slack water." (Italics ours.)

That was Captain Oyan's view. He said (p. 289) that

> "the Bay of Fundy, as we all know, has very strong tides going. Without seeing anything nobody can say sure where the ship stands."

At page 293:

> "You know it is a very dangerous water and big currents that cannot be reckoned which way, and we take bearings to get the ship's position."

At page 300:

> "Nobody can tell anything accurate with the tides like that * * *."

Magnussen (p. 489):

> "When a current is setting so uncertain as in the Bay of Fundy it is impossible to state where the ship is drifting."

To safeguard navigation in these waters, unusually numerous lights are provided, so that a vessel can go out from one light to another (Morrisey, pp. 505, 511, 512; Oyan, p. 324). Lights are of no use when they cannot be seen because of fog; therefore radio stations on shore are provided to give bearings to ships in fog, and, by getting cross-bearings from two or more stations, the precise position of a vessel can be ascertained. Captain Oyan proposed, quite rightly, to use these aids to navigation. To say that his unwillingness to go out through the Bay of Fundy in dense fog by dead reckoning only, means that he did not trust his compass is so far-fetched that it needs no answer. He said (pp. 1016, 1017):

> "Q. You mean you would not go to sea by dead reckoning? A. No.
>
> Q. Is that because your compasses were so bad or wouldn't you do it on any ship? A. No, I wouldn't do it on any ship because the currents in my opinion are so uncertain.
>
> Q. So as I understand you, you started off on this course intending to alter it as the lights indicated, or if there were fog, as radio bearings indicated? A. Yes."

There is no contradictory evidence and no possibility of any finding except that these witnesses (specifically found to be truthful) did believe that the tidal conditions were what they testified.

The ship concededly had on board such printed information as there is about the currents and perhaps, as the majority opinion below suggests (p. 1449), the master made an error of navigation in not trying to check his drift from this information; but, quite obviously, the sight of a light or a radio bearing would be far more reliable than

any deduction from current tables. It seems absurd to suggest that, when an accurate location of a ship's position is possible by radio bearings, any master would be justified in an attempt to "dead reckon" the tides of the Bay of Fundy.

Manifestly, nothing in the foregoing throws doubt on the master's confidence in his compasses. Compasses have nothing to do with drift.

III

The opinions of the Courts below fully recognize the rule of the *Pennsylvania* and involve nothing contrary to the decisions of this Court or of other Circuit Courts of Appeals.

The petition (pp. 11-12) quotes decisions under the *Pennsylvania* made by the Circuit Courts of Appeals for most of the other circuits, but conspicuously omits the Second Circuit, although more decisions under the *Pennsylvania* have been rendered in that circuit than in any of the others. Far from ignoring the *Pennsylvania*, the Circuit Court of Appeals for the Second Circuit has applied it during the last ten years in the following cases:

Marshall Field & Co. v. *U. S.*, 48 Fed. (2d) 763;
The Fulton, 54 Fed. (2d) 467, 469;
The Azua, 56 Fed. (2d) 434, affirming 56 Fed. (2d) 432;
The Clevelander, 83 Fed. (2d) 947 (vessel held not to have violated statute);
Southern Pacific Co. v. *U. S.*, 72 Fed. (2d) 212, 215 (burden of proof held sustained);
The New York Marine No. 10, 109 Fed. (2d) 564, 566;
Henry du Bois v. *A/S Ivarans Rederi*, 116 Fed. (2d) 492, 493; cert. den. 85 L. Ed. 844.

In the *New York Marine* case in particular, the Court applied the *Pennsylvania* rule very strictly. Other decisions of the same Court which have applied the rule, though without specifically citing the *Pennsylvania*, are:

> *Ocean S.S. Co.* v. *U. S.*, 38 Fed. (2d) 782, 785;
> *The San Simeon*, 63 Fed. (2d) 798, 801, cert. den. 290 U. S. 643;
> *The Luna*, 63 Fed. (2d) 808, 809;
> *The Richard J. Barnes*, 111 Fed. (2d) 294.

The petitioners complain (p. 6 of the petition), that the Court below said that the effect of the *Pennsylvania* rule was to shift the burden of proof in regard to causality; but that is precisely what was said by the Circuit Court of Appeals for the Ninth Circuit in the *Denali*, 105 Fed. (2d) 413, at 418, in a passage which the petitioners quote on the same page 6 of their petition. The latter Court, as quoted by petitioners, said that "the violator is burdened with the penalty of showing that the violation not only probably did not cause the accident, but that it could not have done so." In the present case, the majority opinion below said (p. 1450) that the violator must "prove that the violation *could not* have contributed." The two statements, far from being "squarely in conflict", as the petition (p. 8) asserts, are practically identical. The majority opinion here says that the rule deals with the burden of proof. The *Denali* says the same. The majority opinion here goes on to say that the rule does, or may, go so far as to require

> "the defaulting vessel to show that the inference of *non sequitur* was not only the most probable, but even the only possible, inference" (p. 1451).

No stronger statement of the rule could be imagined. The majority opinion treats the rule as a rule of evidence. The petitioners themselves say (p. 31):

> "The rule of the *Pennsylvania* is a rule of evidence which does not affect the substantive rights of the parties."

Both the petitioners and the *Denali* case appear, therefore, to take the same view as the Court below.

At page 8, the petition asserts that the majority opinion below, in effect, holds that it is sufficient for the violator to prove that the violation "probably was not a contributing cause". The majority opinion says nothing of the kind; and does say the contrary.

There is nothing whatever in the majority opinion to indicate that the Court below construed the rule of the *Pennsylvania* in any respect differently from any other court.

The petitioners complain of the statement in the majority opinion (p. 1448) that, if the compass book did not contain all the entries which good seamanship required, nothing was added to the argument by proof of the Norwegian statute; but the petitioner fails to point out that the Court was speaking only of the materiality of the supposed violation and quite correctly said that, if the materiality of the violation were disproved, the result was the same, whether or not a statute were involved.

The petition suggests that if the Aakre's compass records had had more entries, perhaps the accident would have been avoided. It ignores the obvious fact that no amount of compasses or of compass records could have given the slightest indication as to where the vessel was drifting during that period of three hours. Running throughout the petitioners' argument is the false assumption that a compass tells the position of a ship. Of course it does nothing of the kind. The majority in the Court below did not, as repeatedly stated by the petitioners, substitute its judgment for that of the statute. It found that the requirements of the statute had nothing to do with the accident.

Discussing the matter from a somewhat broader point of view, the petitioners' position seems to be that the rule of the *Pennsylvania* requires the violator of a statute affirmatively to disprove any possible connection between the violation and the accident which can be imagined by any flight of fancy. In other words, the petitioners argue that the presumption is practically conclusive, for it is

possible to imagine some conceivable indirect relation of cause and effect between almost any one event and almost any other. In the present case, the petitioners wish to conjecture, in the teeth of the evidence and of the findings, that the master did not trust his compasses. Their next step is to say that, if the master had trusted his compasses, then perhaps he would have been so surprised at the drift of his vessel that he would have taken further steps to verify it, although, as already remarked, no compass affords any information whatever with respect to the drift of a vessel. The argument is nothing but a series of conjectures, opposed to the evidence and to the findings below, involving the sort of "metaphysical niceties" into which this Court declined to enter in *Atchison Ry.* v. *Calhoun*, 213 U. S. 1. To leave matters "in the realm of speculation and conjecture * * * is not enough" (*Chicago, M. & St. P. Ry. Co.* v. *Coogan*, 271 U. S. 472, 478). If every remotely conceivable theory of causation must be negatived, it would be better to say at once that the rule of the *Pennsylvania* is one of *conclusive* presumption.

The principles of law, including the rule of the *Pennsylvania*, must be applied in a practical and realistic manner. There are limits to the amount of conjecture which the law will permit. In the present case, the very first premise of the petitioners' argument is negatived by the facts already found, and the whole of it is too illusory and too fanciful to be accepted in the practical administration of law.

IV

Since such presumptions do not now exist in the law of Canada, the rule of the *Pennsylvania* probably does not apply to this case at all.

It seems at least seriously doubtful whether the doctrine of the *Pennsylvania* is applicable here. If it is a mere rule of evidence, of course it does apply as part of the *lex fori*. If, on the other hand, it is a rule affecting substantive rights, then whether it applies here would depend on

whether it is part of the law of Canada, which concededly governs this case.

Cities Service Co. v. *Dunlap*, 308 U. S. 208;
Central Vermont Rway. Co. v. *White*, 238 U. S. 507.

In *Richelieu Nav. Co.* v. *Boston Ins. Co.*, 136 U. S. 408, a vessel stranded because she was running too fast in fog. There was a Canadian statute, quoted at page 422 of the report, which this Court construed to create a presumption similar to that of the *Pennsylvania*. This Court pointed out, in the *Richelieu* case, that the vessel involved was Canadian, was navigating Canadian waters between Canadian ports, and was governed by the law of Canada. Accordingly the Court applied the Canadian statute just referred to. That seems to be a decision that, in cases governed by the law of Canada, that law should be looked to to determine whether or not such a presumption exists. The present is the case of a Norwegian vessel sailing from a Canadian port for a South American port and stranding in Canadian waters, and all parties agree that the law of Canada, particularly the Canadian Water Carriage of Goods Act, 1936, governs the case. It would seem that, following the *Richelieu* principle, the law of Canada should determine the question of presumption.

Under the law of Canada, there are now, and at the time of this accident were, no such presumptions. All that remains of the statute referred to in the *Richelieu* case is contained in Section 639 of the Canada Shipping Act of 1934, which provides merely that the non-observance of *collision* regulations shall be deemed to be the wilful default of the person in charge of the vessel, unless it is shown that circumstances made a departure from the regulations necessary. The former provisions as to liability of the shipowner no longer exist and the statute has no application to the present case. The Maritime Convention of 1910 (text in Marsden, Collisions, 9th Ed., pp. 542-545) and legislation thereunder (the Canadian Maritime Conventions Act of May 27, 1914, 4-5 Geo. V, Chap. 13, Sec. 5)

abolished such presumptions in collision cases, and there are none under the general law of Canada.*

In *Can. Pac. Ry.* v. *The Storstad,* 17 Exch. Rep., Canada, 160, 170, 171, the Court said:

> "As is well known, there is a difference between the English law and our law that used to exist and which has been very recently abolished. All the English jurisprudence is under the old law. In England, *formerly,* a breach of the rules was presumed to have contributed to the collision or caused it, unless the contrary was proved. Whilst, in our law the *plaintiff has to prove the breach of the rule, and also that it caused or contributed to the collision.*" (Italics ours.)

In *Fraser* v. *The Aztec,* 19 Exch. Rep., Canada, 454, 467, the Court said:

> "The burden was upon plaintiff to prove that the non-observance of the rule contributed to the accident, as non-observance of the rule by itself created no presumption, and the common law applied, and the plaintiff had to prove the cause of the collision" (affirmed 20 Exch. Rep. 450).

In *George Hall Coal Co.* v. *The Parks Foster,* Canada Law Reports, 1923, 56 at 63, the Court said:

> "The burden was upon defendant to prove that the non-observance of the rule contributed to the accident, as its non-observance by itself created no presumption: *Fraser* v. *S/S Aztec* (1920), 19 Ex. C. R. 454, at pp. 467-468."

The general law is illustrated by *Grand Trunk Railway Co.* v. *McAlpine,* 1913 A. C. 838, an appeal from Canada, involving the right to recover damages sustained at a railroad crossing, where the railroad had been guilty of the breach of a statutory duty. The Court held (as stated in the headnote):

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* By stipulation, Exhibit 1, at page 1192, it was agreed that the parties might refer to Canadian and British statutes and decisions as proof of the law of those countries.

> "That in an action for damages for personal injuries a plaintiff relying on the breach of a statutory duty must prove not only the breach, but also that the breach caused the injuries."

In England, such presumptions were abolished by the Maritime Conventions Act of 1911 (1 and 2 George V, Chap. 57). The English rule is thus stated in Marsden (9th Ed., p. 65):

> "The effect of the Act" (Maritime Conventions Act) "is to abolish an arbitrary rule by which any infringement, which by possibility might have contributed to the collision, rendered a vessel to blame and to 'leave the Court to follow what is a reasoning judgment and to say, "Did this want of obeying the regulations in any way contribute to the collision?" not "Might it possibly have done so?"' It has thus now again become necessary to prove that non-observance of a regulation was the cause or part of the cause of a collision or of the damage resulting from the collision, *as it always had been before 1873.*" (Italics ours.)

In England, there are no such presumptions, either in admiralty or at common law (*The Heranger,* 1939 App. Cas. 94, at 104).

The laws of Canada and that of England are therefore the opposite of that for which cargo contends. In the absence of statute, those laws create no presumption. Whatever statutory presumptions formerly existed have been abolished.

No one suggests that there is any such presumption under the law of Norway, and none was proved, although a Norwegian lawyer was called by the petitioners as a witness.

The general rule at common law is that violation of a statute does not create such a presumption.

> *St. Louis etc. Co.* v. *McWhirter,* 229 U. S. 265;
> *Taylor* v. *City of Yonkers,* 105 N. Y. 202;
> 45 *Corpus Juris,* 902, 905;
> Shearman & Redfield, *Negligence,* 6th Ed., Sec. 27.

It would be inconsistent with the *Richelieu* case to apply the law of the United States as the *lex fori* here. If our courts, in deciding cases governed by Canadian law, apply that law when it creates a presumption, they must apply it likewise when it does not create one.

Moreover, the petitioners' contention would lead to the strange result that our courts, in deciding such a case under Canadian law, would reach one conclusion if the vessel belonged to a country having such regulations as those of Norway, and a different conclusion if the vessel belonged to another country having no such regulations.

Finally, the Canadian Water Carriage of Goods Act, which governs this case (Schedule of Rules, Art. IV, subds. 1 and 2) places upon the petitioner the burden of proving (1) that the ship was unseaworthy; (2) that the unseaworthiness caused the accident (*Carver, Carr. by Sea,* 8 Ed., Sec. 17). The petitioners are seeking to substitute for this proof, required by the Canadian statute, a presumption which does not prevail under the law of Canada.

V

Conclusion

It is submitted that the decisions below are decisions on the facts raising no question for the review of this Court; and that, in so far as the rule of the *Pennsylvania* was discussed in the courts below, its validity was fully recognized and no decision was rendered which in any way conflicts with the decisions of this Court or of other Circuit Courts of Appeals.

Dated, New York, N. Y., November 19, 1941.

JOHN W. GRIFFIN,
Counsel for Respondent.

WHARTON POOR,
JAMES MCKOWN, JR.,
of Counsel.

NOV 24 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 715.

In the Matter

of

The Petition of REDERI A/S HENNESEID, as Owner of the Motor Vessel AAKRE, in a cause of exoneration from or limitation of liability.

CHARLES I. WATERMAN, *et al.*,

Petitioners,

—against—

Motor Vessel AAKRE, REDERI A/S HENNESEID, LAMPORT & HOLT LINE, LTD., and CONTINENTAL GRAIN COMPANY,

Respondents.

BRIEF OF LAMPORT & HOLT LINE, LTD., IN OPPOSITION TO PETITION FOR CERTIORARI.

CHAUNCEY I. CLARK,
Proctor for Lamport & Holt Line, Ltd.

JOHN L. GALEY,
Of Counsel.

New York, Nov. 21, 1941.

THE COURT PRESS, N. Y. C.

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Neither the decision nor the language of the courts below intrenched upon or impaired the rule of *The Pennsylvania*, 19 Wall. 125. On the contrary, both courts below recognized the rule and found as a fact that, if there was any breach of the Norwegian regulations in the months before the stranding with respect to the entry in the compass book of observations as to compass deviation such breach could not have caused

or contributed to the stranding. It was so held after a trial lasting the better part of three weeks involving a variety of contentions by cargo. When both the District Court and the Circuit Court of Appeals have passed on a question of fact this court will not again examine the evidence to determine the correctness of the findings.

> *The Carib Prince*, 170 U. S. 655, 658;
> *The Wilderoft*, 201 U. S. 378;
> *La Bourgogne*, 210 U. S. 95, 114;
> *Bochmer* v. *Pennsylvania Railroad Company*, 252 U. S. 496.

Some review of the facts is however desirable in view of statements and implications in the petition and supporting brief which the record does not support.

The Circumstances of the Stranding.

The vessel sailed from St. John, New Brunswick, at about 9 p. m. on October 28, 1937, on a magnetic course (South 49° West) which allowing for local variation and an easterly deviation of 3°, was equivalent to 211° true. This course, if made good, would have taken the vessel safely out of the Bay (1387-8). But as the distance to the entrance was about 50 miles and the vessel in the meantime would be subject to the effect of wind and currents, this was only a starting course and the master intended to obtain his position by radio bearings or shore lights before passing out of the Bay (Oyan, 218, 219).*

* References are to pages unless otherwise indicated.

At 11:45 after the vessel had gone by her log some 26 miles (fol. 4185) she was stopped owing to breakdown of the engines; the log was taken in; and from that time until 2:50 a. m. the vessel was drifting in a fog without any facilities for measuring the actual effect of tide, current or wind.

At 1:45 a. m. the third officer reported to the master, who had retired, that he had seen and counted the flashes of a light on the easterly shore, bearing south-east by east ½ east and that they indicated Prim Point (222). When the master came to the bridge the light was shut out by fog or rain.

The supposed sighting of the light owing to the limited range of its visibility indicated that the vessel was then on the easterly side of the Bay. The master, therefore, immediately ordered the second officer to obtain the radio bearing from St. John.

Shore lights and radio bearings are the most reliable aids which navigators have in determining their position. Radio bearings, especially when passing entirely through water, are completely reliable (281, 290, 298). A bearing obtained after the vessel stranded passed directly through the ship (see 1392).

The second officer, as radio officer of the ship, had obtained hundreds of radio bearings for the master on previous occasions without a single known error (213). In this case, however, the second officer laid down the radio bearing received at 2:25 a. m. (364) with an error of about 20 to the eastward. The vessel was still drifting without power and the master considered that he was obliged to fix his position at a point at or near the intersection of the bearing from Prim Point light and the line of the radio bearing since the sighting and bearing of the light confirmed and was confirmed by the radio bearing.

At 2:50 a. m. the voyage was resumed on a course to the westward of the starting course. At 3:41 a. m. the master *made a further check* on the supposed double check he already had, by obtaining another radio bearing from St. John, which, as incorrectly plotted by the second officer on the chart, only confirmed the previous radio bearing. Ten minutes later a further cross bearing, which was correctly laid down on the chart, indicated that the vessel was in shoals on the easterly side of the Bay. To escape the danger, the master changed the course at 4 a. m. sharply to the westward and reduced his speed. At this time the vessel was in fact close to Grand Manan Island on the northerly side of the entrance to the Bay. Twenty minutes later she stranded.

The vessel in fact at all times, up to the time the engines broke down, as the Courts below found, was on the course indicated by her compass making proper allowance for a deviation of not exceeding 3° which was the deviation applicable to such course properly noted in the compass book from an observation taken on September 27, 1937, about a month before the stranding (1384, 1386, 1447). While under way she went right where it might have been supposed she would go on the basis of her heading by compass and her compass book except as affected by tide, current and wind.

The errors which resulted in the stranding had nothing to do whatever with any deficiencies in the compass records.

The Compass, the Records of Deviation and the Norwegian Decrees.

The petitioners first contended that the whole story of the ship's officers as to the courses pursued by the vessel could not be believed and in any event that the compasses were defective and that the vessel was not properly supplied with charts. These claims were rejected by the Trial Court. The failure of the officers on previous voyages to make notations in the compass book (as distinguished from the log book) of all their daily observations for deviation was the only basis left for claiming a shortcoming in the vessel's equipment. But this had no rational connection with the stranding. The petitioners attempt to fill in this hiatus by reliance on the Norwegian decrees and the rule in *The Pennsylvania.*

After a vessel is built or repaired and at other times when compass observations indicate that it is necessary, the compasses are tested by an expert who prepares a compass card showing the deviation on various headings. This constitutes the basic information with respect to the compass. From day to day, while the vessel is at sea, when weather conditions permit, observations are taken of heavenly bodies, usually the sun, to determine whether on the various courses which the vessel pursues there is a substantial departure from the deviation indicated on the compass card. All this was done on the "Aakre".

In 1926 and in 1932 the Norwegian Government issued certain regulations (1124, 1126) directed to ships' officers, prescribing how certain ships' records should be kept. The decree of 1932 provided, among other things, that when a ship of over 500 tons was

at sea "deviation examination must be made every day, when it can be done" and further prescribed that when such vessels were in foreign trade the entries with regard to the examinations should be made in a special compass and chronometer book "in accordance with the rules for entering in the book." A penalty was provided as against the officers (but not the owner) for failure to keep the records as required.

These decrees have no counterpart in the law of the United States or the law of Canada.

The petitioners, after referring to the regulations requiring daily observations when the weather permitted and the making of entries in the compass book, state in their petition that "the navigators of the 'Aakre' had made no attempt to comply with this statute." *This is a misstatement unless the findings of the courts below are to be completely disregarded.* Judge Woolsey held:

> "I believe the testimony of the ship's officers that the deviations noted on the compass card were checked by daily observations, many of which were recorded in the compass book; and I agree with the ship's counsel that the recording of all the identic observations of deviation would not add anything to the information of a person seeking to navigate the 'Aakre'" (p. 1385).

This finding was not disturbed on appeal. The Circuit Court of Appeals said:

> "The Court found however that adequate observations had been made and from the log book entries that the deviation in the southwest quadrant had never been greater than 3°" (p. 1447).

The only possible claim of noncompliance with the Norwegian regulations arises from the failure of the

officers to make entries in the compass book, as distinguished from the log, of *all* the daily observations for deviation. As to this the master testified that observed deviations which were the same as shown by the compass card were not all entered in the compass book though the deviations actually used on each watch as ascertained or checked by the daily observations appear in each day's entries of the log (208, 209).

The Norwegian decree of 1926 did not require the grouping of observations under compass points (p. 1125). The entries in the compass book of the "Aakre" were however grouped under the 36 different points of the compass. The log entries of compass observations were of course kept chronologically.

Naturally there are many long intervals between the dates of various entries in the compass book under each point or segment of the compass circle, as any single daily observation would be entered only under the compass point representing the course the vessel was then pursuing, and months might elapse between different times when the vessel was pursuing any particular course. Neither the Norwegian statute, however, nor good seamanship required that the compass book should contain frequently repeated observations on any one point of the compass. The fact, therefore, that there were gaps in the entries of the compass book for any point or segment is of no significance whatever.

All the courses of the vessel on the night of the accident lay in the S. W. quadrant. The courts below found that the daily observations over a period of a year and seven months before the stranding had not disclosed a single deviation in this quadrant of more than 3° (1447, 1385). The latest observation noted in the compass book applicable to the course from St.

John was made September 30, 1937, less than one month before the accident (Opinion C. C. A. 1447; Dist. Ct. 1384).

The Circuit Court of Appeals held expressly that the compass book "carried the particular entry necessary for the occasion" (1447).

The language of petitioner's brief also carries the implication that the compasses were not reliable and that the master accordingly had no confidence in the courses laid down by them. This also is contrary to the findings of the courts below. Judge Woolsey found as follows:

> "I find that they" (the compasses) "were of standard and satisfactory type, and that they had good directive force" (1382) * * *.
>
> "The deviations of the compasses were reduced practically to a minimum and the adjustment was, in the opinion of the petitioner's experts,—who inspired me with more confidence than the experts for cargo—an excellent piece of work. Indeed, there does not seem to have been any real criticism of any value in respect of this compensation, and I find that there was not any evidence from the observation at Sandefjord that there was any lack of balance or stability in the compasses.
>
> I find further, without any hesitation, that the compasses were good compasses and that they were properly adjusted on leaving Sandefjord" (1383).

The Circuit Court of Appeals said:

> "The compasses were shown to be accurate and reliable, the court found that they were, and the appellants have not even made out a serious case to the contrary" (1446).

> "On the contrary, it has already been stated that the compass was shown to be highly accurate * * *" (1449).

The District Court also found that the vessel was "well settled magnetically" (1384).

POINT I.

Both courts below, assuming the law to be as petitioner contended on all material points, decided the case on a pure question of fact.

Both courts held that if the Norwegian regulations required *all* deviation observations to be entered in the compass book the failure of the navigating officers to do so could not have caused or contributed to the stranding. Judge Woolsey said (1401-2):

> "I think it is unnecessary for me to discuss or decide the juridical status before this Court in this cause of the Norwegian Statutes relied on by cargo. Because, even if they have the effect on the burden of proof for which cargo contends, and make the so-called Pennsylvania rule applicable, this is one of the rare cases in which the shipowner has sustained the heavy burden of proof laid on it by that rule, and has shown that, if there was any breach of said Norwegian Statutes or Rules, such breach not only did not but could not, under the facts here shown, have caused or contributed to the 'Aakre's' stranding."

The Circuit Court of Appeals said (1450-1):

> "Still, if it were applied in the strongest sense conceivable, requiring the defaulting vessel to show that the inference of *non sequitur* was not

only the most probable, but even the only possible, inference from the facts in evidence, appellants still could not succeed; for every point at issue in the case, including the captain's faith in his compass, was established by direct testimony.

The questions involved in this proceeding were questions of fact which the court below resolved in an opinion which demonstrates the care and consideration which he gave to the matter. D. C. S. D. N. Y., 31 F. Supp. 8-23. In view of this, criticisms made of it that he was confused as to the navigator of the ship, because he did not always distinguish between the master and the second mate, seem rather captious. His material findings are clear and definite. We have recently emphasized that admiralty findings should be accepted on appeal unless clearly erroneous. *United States Gypsum Co.* v. *Conners Marine Co.*, 2 Cir., 119 F. 2d 689; [fol. 1454] *Johnson* v. *Andrus*, 2 Cir., 119 F. 2d 287; *McAllister Bros.* v. *Pennsylvania R. Co.*, 2 Cir., 118 F. 2d 45. Here they seem quite the most natural and rational under the circumstances; indeed, cargo's real complaint is with the policy of Canada and ourselves as to the merchant marine, which accords the water carrier full protection against the negligent navigation of its own servants. Robinson on Admiralty, 1939, 495-503."

These findings of fact completely dispose of the case unless *The Pennsylvania* rule means that once a violation of the statute or regulation is established there is liability for any subsequent loss or damage on the principle of *post hoc ergo propter hoc.*

In reaching their decision both courts below assumed *arguendo* every issue of law or statutory interpretation in favor of the cargo.

They assumed (1) that a breach of the Norwegian regulations as to the keeping of records would have the same effect as the breach, at the time of an accident, of a statutory rule of navigation; (2) that such regulations, though they were expressly directed only to the master and navigating officers and though a penalty as against such officers, and not against the owner was provided for, enlarged the civil liability of the owner by visiting on it the penalty of *The Pennsylvania* rule (see to the contrary, semble, *Warshauer* v. *Lloyd Sabaudo S/A*, 71 F. (2d) 146); (3) that the effect of the regulations was to require the entry in the compass book of *all* observations, whether reliable or not, misleading or otherwise, and to deprive the officers of any discretion in the matter; (4) and that the rule of *The Pennsylvania* would be applicable in our courts although such a rule is not in force in Canada where the stranding occurred and there was no proof that such a rule exists under Norwegian law.

This leaves petitioners little to complain of except the adverse finding of fact.

POINT II.

The courts below neither "abandoned" nor qualified *The Pennsylvania* rule.

The rule of *The Pennsylvania* has been frequently applied and reaffirmed by the Circuit Court of Appeals of this Circuit. Some of the more recent decisions are as follows: *The Esperanza*, 16 F. (2d) 945, 946; *The Mabel*, 35 F. (2d) 731, 732; *Marshall Field & Co.* v. *U. S.*, 48 F. (2d) 763, 766; *The Fulton*, 54 F. (2d) 467, 469; *The New York*

Marine No. 10—The C. F. Coughlin, 109 F. (2d) 564, 566; *Henri DuBois Sons Co.* v. *A/S Ivarans Rederi*, 116 F. (2d) 492, 493.

The District Court made no comment on the rule itself but, assuming that the Norwegian decrees or regulations required an application of the rule, held that the respondents had proved that the alleged breach of the regulations had not caused or contributed to the stranding.

The Circuit Court of Appeals in affirming commented on the rule not because the respondents' proof fell short of showing that no breach of the decrees could have contributed to the stranding but because there was some question as to whether the rule was one of procedure or of substantive law. In the latter case our courts could not apply it as the *lex loci delicti* was the law of Canada which did not recognize the rule.

The petitioners contended below that the rule was one merely of evidence (1450) and should therefore be enforced in our courts. The Circuit Court of Appeals did not find it necessary to reach any conclusion as to this point as it found that in any event the alleged non-compliance with the regulations could not have caused the stranding.

The remark of the court (1450) that "the history of its application shows that it has done no more than shift the burden of proof with regard to causalty" is merely what it purports to be, a statement as to the "history of the application" of the rule and as such it has not been questioned by the petitioners.

If there is any distinction between a requirement that the violator of a statute shall prove a negative with respect to causation and a requirement that it shall prove that the violation could not have caused

the loss, the Circuit Court of Appeals did not commit itself to either alternative nor did the state of the proof require it to do so.

The petitioners further contend that the Courts below substituted their judgment for the requirement of the statute and thereby impaired the rule when they considered the adequacy of the ship's deviation records, the evidence bearing on the master's confidence in his compass courses and his knowledge of compass performance. The petition and brief are studded with statements such as that the court "accepted the captain's opinion against the requirements of the statute", "substituted their own judgment for that of the law making power", and held that "the master's information with respect to the compass was adequate although not what the statute required".

One of the petitioners' principal contentions in the courts below was that the vessel was in fact unseaworthy. Of course the courts were entitled to consider any evidence bearing on that issue.

But as respects the application of *The Pennsylvania* rule these findings were highly material. Since the vessel, while under way went where the latest applicable entries in the compass book indicated she would go, the petitioners fell back on the contention that other alleged deficiencies in the compass book might have contributed to the stranding by undermining the master's confidence in his compass performance and so opened his mind to ready acceptance of the radio bearings (Op. C. C. A. 1448).

This raised directly the question of the captain's state of mind with respect to his compasses and their performance as well as the adequacy of his records for dead reckoning on the courses which he pursued.

The Circuit Court of Appeals said:

> "This argument puts directly into issue the captain's state of mind—his belief in the accuracy of the compass and the sufficiency of the compass data, as well as the fact of the accuracy of the one and the sufficiency of the other. The captain himself testified that the 'Aakre's' compass was the best he had ever used, and that the compass data were 'sufficient for safe navigation'; and the trial court accepted this testimony not only as true in fact, but also as a true statement of what the captain had always believed. This is a complete answer unless other facts are shown which make the captain's faith absolutely incredible" (p. 1448).

The court did not substitute its judgment or that of the master for that of the Norwegian law maker; the breach of the regulations was assumed; the findings which, the petitioners say, are an impairment or abandonment of *The Pennsylvania* rule were simply by way of inquiry into the theory of causation which the petitioners themselves had suggested.

POINT III.

The petitioners' suggestion of a causal relation between non-compliance with the Norwegian regulation and the stranding is fantastic.

When the vessel resumed her course at 2:50 A. M., the evidence establishes that the master considered that dead reckoning, however accurate the compass, was no longer a factor of weight in determining his position (278, 289, 293, 299, 867, 877, fols. 3048, 3049).

Apart from that, there is no connection between

the compass book and the master's error since the appropriate entries in the compass book indicated the actual deviation.

If, however, the book had contained no such entries the compass records could have had no connection with the stranding on the theory that the master in accepting the radio bearings accounted for his position by a possible deviation of the compass.

Since the error in the laying down of the bearing received at 2:30 was about 20° and the vessel had pursued a steady course from St. John up to the time of the breakdown her position on the line of the bearing could not be accounted for by deviation of the compass except by assuming approximately a 20° deviation. Of the more than 1000 entries in the logs of courses used in the various watches for nineteen months before the stranding and checked by daily observations only three exceed 3° and only one exceeds 4°, all on Northerly courses. The average of all such log entries as to deviation either way, even disregarding plus or minus signs was less than 1°.

The courts below, therefore, did not err in finding that the master was telling the truth when he said that neither compasses nor deviation had anything to do with the errors of navigation which he made based on the radio bearings (230).

The petitioners' suggestion that the rule of *The Pennsylvania* can be invoked because the master set the course from St. John without allowing for a 3° easterly deviation is answered in the findings of the courts below that the compass book contained the appropriate data apprising the master of this deviation.

But if every entry of deviation observations had been made in the compass book which the petitioners

claim should have been made, and such additional earlier entries had any influence with the master their tendency would have been, not to apprise him of a 3° deviation but to induce him to believe there was no appreciable deviation. Most of the log entries for the course of south 50° west and related courses 5° either way, as well as for all the courses in the southeast and southwest quadrants show deviations of less than 3° or no deviation. None show a deviation of more than 3°. The average of all the entries in the log with respect to deviations on courses in the above mentioned 10° segment is only about 17/24th of a degree. In so far, therefore, as a complete record in the compass book of all observations as to deviation on these courses or any courses in the southwest quadrant could have influenced the master they must have influenced him in the direction of the decision which he actually made, while on the other hand the entries actually made in the compass book taken alone would indicate the 3° easterly deviation which the Court fixed as the maximum.

The master's setting a course without making allowance for deviation was not in itself a breach of the Norwegian regulations. The petitioners do not even suggest a possible causal connection between the master's decision and any breach of these regulations. They claim that the nonallowance of a 3° deviation may have contributed to the accident, but they never complete the necessary syllogism, the reason, of course, being that the only possible effect of a literal compliance with the regulations must have been in the direction of making the captain act precisely as he did.

POINT IV.

The Dissenting Opinion.

Judge Frank despite his remarks as to *The Pennsylvania* rule seems to have dissented from the majority opinion, as finally recorded, wholly on a question of fact.

The District Court and the majority in the Circuit Court of Appeals held that no violation of the Norwegian decrees could have caused or contributed to the stranding. Judge Frank's dissent, therefore, is based entirely on his view that the proof failed to establish that the alleged breach of the regulations could not have caused or contributed to the stranding.

He attached importance to the testimony in the record showing that on certain previous occasions during the year and a half preceding the accident there were discrepancies between the position of the vessel by observation and her position by dead reckoning.

It seems quite plain that Judge Frank misunderstood the purpose for which this testimony was offered in the court below and that he erred, as a matter of navigation, in giving it any weight.

The libellants offered the evidence above referred to in the District Court as bearing on the intrinsic infirmity of the compasses and relied on it in the Circuit Court of Appeals as showing the incompetency of the navigators and therefore the unseaworthiness of the vessel. It was never claimed that these discrepancies indicated or were the results of any failure to make entries of deviations in the compass book. The discrepancies were sometimes one way and sometimes the other and sometimes in the direction of the

vessel's course and had no connection or correspondence whatever with the compass deviations observed and noted in the log.

This evidence was appraised both in the District Court and the Circuit Court of Appeals. Judge Woolsey said:

> "It does not seem to me that in view of the compass records, the evidence of disparity between the dead reckoning and the observed position in the year and a half preceding the accident would indicate any intrinsic infirmity in the compasses. There are too many unascertainable variables to consider in connection with such disparities, as, for example, that the vessel may have been poorly steered, that the observations of the officers may have been inaccurate and that the judgment of the master as to current and drift may have been at fault" (p. 1384).

The Circuit Court of Appeals in considering the same evidence said:

> "Appellants recite at great length a list taken from the 'Aakre's' logbook of discrepancies between dead-reckoned and observed positions on previous voyages as evidence of inaccurate navigation. Most such discrepancies are no greater than are reasonably to be explained by the incalculable effects of tide, currents, and wind. To some extent they might be attributable to poor steering or inaccurate observation. But the greatest discrepancies shown are all largely along the line of the ship's course, not transverse to it, and to that extent not relevant to the performance or reading of the compass" (p. 1449).

Judge Frank did not vote for reversal of the decision of Judge Woolsey but merely for remand for the purpose of making further findings, his chief interest apparently being in this testimony (1456) which was dismissed by both courts as having no probative value.

POINT V.

The Petition should be denied.

Respectfully submitted,

CHAUNCEY I. CLARK,
Proctor for Lamport & Holt Line, Ltd.

JOHN L. GALEY,
Of Counsel.

New York, Nov. 21, 1941.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 715.

In the Matter

of

The Petition of REDERI A/S HENNESEID, as Owner of the Motor Vessel AAKRE, in a cause of exoneration from or limitation of liability.

CHARLES I. WATERMAN, *et al.*,

Petitioners,

—against—

Motor Vessel AAKRE, REDERI A/S HENNESEID, LAMPORT & HOLT LINE, LTD., and CONTINENTAL GRAIN COMPANY,

Respondents.

BRIEF OF CONTINENTAL GRAIN COMPANY, RESPONDENT IMPLEADED, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

This case presents no reason within Rule 38 paragraph 5 for the issuance of a writ of certiorari. Neither the decision below nor that of the District Court is in conflict with applicable decisions of this Court or with applicable decisions of another Circuit Court of Appeals. The question involved is not one of general importance, nor does it affect the public interest. The basic question is purely one of fact on

which the concurrent findings of the District Court and of the Circuit Court of Appeals should be accepted by this Court.

The Case Below.

The case involves the single question of whether the stranding in the Bay of Fundy of the M. V. "Aakre" in the early morning of October 29, 1937, with consequent damage to petitioners' cargo laden thereon, was due to an error of navigation of the ship's officers, for which the vessel and carrier are relieved from responsibility by the terms of the Canadian Water Carriage of Goods Act, 1936, incorporated in the bills of lading, or was due to unseaworthiness of the vessel caused by want of due diligence on the part of the carrier for which the vessel and carrier are not relieved from responsibility by said Act.

The District Court after hearing practically all the witnesses orally, in a careful and well considered opinion, based on clear and definite findings of fact, held that the stranding was solely due to errors of navigation of the second officer in erroneously transcribing to the navigating chart two radio bearings received by him from St. John, by reason of which error the master was deceived so that he changed his course to the westerly and brought his ship up on the shoal.

The Circuit Court of Appeals affirmed the decree below, likewise finding that the stranding was due to the second officer's errors in navigation. Judge Frank, in a dissenting opinion, thought that the District Judge had not made an adequate finding of fact negativing the possibility that the violation of a Norwegian Statute, which required the ship's officers to record

deviations of the compass in the ship's compass book, could have contributed to the stranding and suggested that the case should be remanded for further findings on this point.

The opinion of the District Court is reported in 31 F. Supp. 8; it is printed in the record at pages 1370-1405. The opinion of the Circuit Court of Appeals is reported in 122 F. (2d) 469; it is printed in the record at pages 1443-1462.

Argument.

I.

The decisions below are in conflict neither with the rule enunciated by this Court in *The Pennsylvania*, 19 Wall. (86 U. S.) 125, nor with the decision of another Circuit Court of Appeals.

From petitioners' brief one might infer that the decisions of both courts below emasculated the rule of *The Pennsylvania*, 19 Wall. (86 U. S.) 125, and were contrary to the decision of the Ninth Circuit Court of Appeals in *The Denali*, 105 F. (2d) 413. Nothing could be further from the truth. The rule of *The Pennsylvania*, *supra*, springs from the following sentences in the opinion of this Court at page 136:

> "But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been."

The rule thus laid down is clearly a rule of evidence to be applied by the Court to the facts as found by it.

The District Court recognized this rule and, having applied it to the facts, held that "the shipowner has sustained the heavy burden of proof laid on it by that rule, and has shown that, if there was any breach of said Norwegian Statutes or Rules, such breach not only did not but could not, under the facts here shown, have caused or contributed to the 'Aakre's' stranding" (R. 1401-2). It also found and held on the facts "that the stranding of the 'Aakre' was exclusively due to errors of navigation in the respects above described, and that her stranding not only was not caused or contributed to by any unknown deviation in her compass or any failure, of which her navigators may have been guilty, to record all her compass deviations in her compass book but under the facts here shown could not have been caused thereby" (R. 1401).

In view of this clear and express application by the District Court of the rule of *The Pennsylvania* to the facts as found, the express finding that the stranding was "exclusively due" to errors of navigation and the further finding that the failure of the ship's officers to record all compass deviations in the ship's compass book not only did not cause or contribute to the stranding but could not have done so, it is difficult to find any substantial ground for Judge Frank's view that the findings on this point were inadequate (R. 1461).

The Circuit Court of Appeals in its discussion of the rule of *The Pennsylvania* (R. 1450-1) as applied to the facts at bar pertinently observed that, if it is more than a rule of evidence or procedure shifting "the burden of proof with regard to the causal relation

of default to injury" * * * "it affects the substantive rights of the parties" * * * and "is not applicable to a cause triable under foreign law". It then held that, if the rule "does no more than shift the burden of proof, the vessel has met that burden in this case by credible evidence on every point at issue" * * * "Still if it were applied in the strongest sense conceivable, requiring the defaulting vessel to show that the inference of *non sequitur* was not only the most probable, but even the only possible, inference from the facts in evidence, appellants still could not succeed; for every point at issue in the case, including the captain's faith in his compass, was established by direct testimony" (R. 1450-1).

Not even legal casuistry can obscure the meaning of these plain words from the decisions below. They show a clear application of the rule of *The Pennsylvania* to the facts as found. The petitioners' solemn statement that this case presents the question of "whether the rule laid down by this Court in *The Pennsylvania* is still law in the Second Circuit" (Petition, p. 5) is without foundation. If that rule contemplated anything more than a rebuttable presumption—which is all that its wording indicates—then, even had it been created by statute, it would have been unconstitutional as a violation of the due process clause of either the Fifth or the Fourteenth Amendment. *Heiner* v. *Donnan*, 285 U. S. 312, 328; *Schlesinger, et al.* v. *State of Wisconsin*, 270 U. S. 230, 240; *Western & Atlantic R. R.* v. *Henderson, et al.*, 279 U. S. 639, 644. It must, therefore, be presumed that this rule of *The Pennsylvania* established by the Court itself constituted nothing more than a rebuttable presumption and provided merely, as the Circuit Court

of Appeals below stated, "a shift in the burden of proof with regard to the causal relation of default to injury" (R. 1450).

The fact that in cargo damage cases the rule in *The Pennsylvania* adds nothing to the ordinary rules of evidence as alleged in petition, page 9, is of no consequence since cargo always makes out a *prima facie* case upon showing delivery to the ship in good condition and receipt in bad condition, thereby throwing the burden of going forward with the evidence upon the ship. *The Pennsylvania* was a case of collision between two vessels where either vessel, to recover, had to prove negligence of the other as well as its own damages, so that the presumption created an important change in the rules of evidence.

The application of the rule of *The Pennsylvania* to the facts as found below is not in conflict with any decision of this Court. Nor is it in conflict with any applicable decision of another Circuit Court of Appeals. Petitioners' brief appears to rely mainly upon *The Denali*, 105 F. (2d) 413, 418 in the Ninth Circuit where the Court quotes from its previous decision in *The Princess Sophia*, 61 F. (2d) 339, 347, in which the word "penalty" is used in describing the burden placed upon a shipowner under the rule of *The Pennsylvania*. The use of an inapt descriptive word by a lower court in discussing a rule laid down by this Court does not modify the rule and this Court's approval thereof is not given by a denial of certiorari. *United States, et al. v. Carver, et al.*, 260 U. S. 482, 490. In fact having used the word "penalty" the Circuit Court of Appeals for the Ninth Circuit proceeds to define it as meaning merely a shifting of the burden of proof which is precisely the way in

which the Circuit Court of Appeals herein defined the obligation under the rule.

In situations involving the application of the rule of *The Pennsylvania* it is almost impossible to say that any one case is in conflict with another since each decision depends upon the facts as found therein and such facts are rarely twice alike. As long as both courts below understood the rule correctly (as it clearly appears they did) and applied the rule to the facts as found, their decisions should not be disturbed.

The questions involved below were entirely questions of fact which were resolved in favor of the respondents. (See opinion of Circuit Court of Appeals: R. 1451.) Both courts having found as a fact that the violation of the Norwegian statute did not and could not have caused or contributed to the stranding of the vessel, such findings should be accepted as conclusive by this Court under well settled doctrine. *Wuppermann* v. *The Carib Prince,* 170 U. S. 655, 658; *Workman* v. *Mayor etc. of New York,* 179 U. S. 552, 555; *International Navigation Co.* v. *Farr & Bailey,* 181 U. S. 218, 224; *W. J. McCahan Sugar Refining Co.* v. *The Wildcroft,* 201 U. S. 378, 387.

II.

It is doubtful whether a breach of the Norwegian statutory provisions with reference to the keeping of compass records would come within the rule of *The Pennsylvania,* 19 Wall. (86 U. S.), 125.

The Norwegian statutory provisions were as follows:

(a) Royal Decree of October 21, 1926, which provided that a special compass and chronometer book

made in connection with an annexed formula should be kept on all ships of over 500 tons gross register (R. 1124). The annexed formula referred to in the decree contained provisions as to the entering of information regarding compass-compensations and complete deviation-investigations and provided that "the enterings shall be done by him who has made the compensation or the investigation" and that, if this person was not an expert from ashore, the captain was to see that the enterings were made and, if he found it convenient should group by themselves the data for one or more courses that lay near to each other (R. 1125).

(b) Royal Decree of December 2, 1932, which provided that the captain should see that the compasses were kept in good order and "their deviation examined"; that when the ship was at sea deviation-examination must be made every day when it can be done and that on ships above 500 tons gross register in foreign trade "shall the result of compensation and examination of deviation be entered into a special compass-and chronometer book" (R. 1126).

(c) Section 421 of the Norwegian Criminal Code of May 22, 1922, which provided: "If the Master, Mate or Engineer on a Norwegian ship fails to do what is prescribed with regard to enterings in log book or other books or the keeping up and handing in of such, he shall be punished with fines or with prison until 2 months" (R. 1126).

These decrees and statute are merely disciplinary regulations directed to the officers and engineers of the ship and not to the vessel or owner. The vessel's continuance in navigation is not made contingent upon her officers' compliance with these requirements.

The case, therefore, differs from *The Denali,* 105 F. (2d) 413, where the statutes involved (fixing the length and number of watches at sea and the number of officers) were directed to the owner and vessel as well as the master, and provided that in case of violation the owner was subject to fine and his ship subject to prohibition from navigation.

Likewise the Section of the Criminal Code is penal in nature and as such should be "construed to apply only to the class of persons to whom it specifically refers" *Warshauer* v. *Lloyd Sabaudo,* 71 F. (2d) 146, 148, C. C. A. 2; *Field* v. *United States,* 137 F. 6, 8, C. C. A. 8; *Martin* v. *United States,* 168 F. 198, C. C. A. 8. It would appear, therefore, that any inference or presumption to be drawn from violation of these Norwegian decrees and statutory provisions should be purely against the officers and crew who were required to enter the data in the log books and who were subject to penalty and imprisonment if they did not do so, rather than against the owner of the vessel who is nowhere mentioned in said decrees or statute. In this connection consideration should be given to the well established rule that a penal statute of another country will not be enforced in the United States *Huntington* v. *Attrell,* 146 U. S. 657; *The Vestris,* 53 F. (2d) 847, D. C. S. D. N. Y.

We know of no case where the rule of *The Pennsylvania* has been held by an American court to apply to the violation of foreign statutory provisions like those involved below where, as here, there is no proof that such violation would have given rise to any such presumption in the courts of the country that enacted such statutes.

Under English and Canadian law at the time of

the stranding legal presumptions arising out of collisions had been abolished by the adoption of the Brussels Maritime Convention of 1910. As the cargo was laden and bills of lading issued in a Canadian port, its rights were determined by the Canadian law, the Canadian Water Carriage of Goods Act 1936 having been expressly incorporated into the bills of lading.

The only decision of this Court applying the rule of *The Pennsylvania* to a non-collision case is *Richelieu Navigation Co.* v. *Boston Insurance Company*, 136 U. S. 408, 422-3, which was an action on a marine insurance policy for loss caused by stranding of a vessel in Canadian waters where the rule was applied because of the provision of a Canadian statute then in effect creating a presumption of fault from the non-observance by any vessel of any of the rules prescribed thereby.

All except one of the cases (*Dorrington* v. *City of Detroit*, 223 F. 232), cited by petitioners at pages 11 and 12 of their brief arose out of collision. There would seem to be a distinction between violation of rules of navigation (designed to prevent collisions), in a collision case where the collision itself necessarily creates a presumption that it was caused by the violation of the rule, and violation of a statute regarding entry of deviations in a particular compass book (designed to perfect navigators' records and make them more accessible) in a stranding case, since the stranding itself would not necessarily create a presumption that it was caused by a violation of the statute concerning such entry of deviation records.

III.

The question involved is not one of general importance and does not affect the public interest.

This is a mere cargo damage case in which, under the controlling Canadian Carriage of Goods by Sea Act 1936, the sole question at issue is whether the stranding which caused the damage was due to errors in navigation of the ship's officers for which the carriers are freed of responsibility by virtue of said Act. It is purely a question of fact. A case involving similar facts would rarely happen again. In fact both at the trial and on the appeal petitioners futilely argued that the simple mistakes of navigation made by the second officer could not have been made (R. 1446). No loss of life is involved. It is not a case of general importance. In no way does it affect the public interest.

CONCLUSION.

It is, therefore, respectfully submitted that the petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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Continental Grain Company,
Respondent.

H. C. ARCHIBALD,
Of Counsel.

November 21, 1941.

FILED
DEC 2 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 715

IN THE MATTER

of

The Petition of REDERI A/S HENNESEID, as Owner of the Motor Vessel "AAKRE," in a cause of exoneration from or limitation of liability.

CHARLES I. WATERMAN, *et al.*,
Petitioners,

v.

Steamship "AAKRE," REDERI A/S HENNESEID, LAMPORT & HOLT LINE, LTD., and CONTINENTAL GRAIN COMPANY,
Respondents.

REPLY BRIEF ON BEHALF OF PETITIONERS

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Steamship "AAKRE," REDERI A/S HENNESEID, LAMPORT & HOLT LINE, LTD., and CONTINENTAL GRAIN COMPANY,
Respondents.

REPLY BRIEF ON BEHALF OF PETITIONERS

The briefs filed by the respondents are not directed to the issue raised by the petition.

The respondents make no attempt to suppport the statement of the Circuit Court of Appeals that the rule of *The Pennsylvania* (19 Wall. U. S. 125, 136)—

> "has done no more than shift the burden of proof with regard to causality" (R. 1450).

The only one of the respondents who refers specifically to this statement (which is one of the principal grounds of our petition) dismisses it with the extraordinary assertion that "*it has not been questioned by the petitioners*" (Lamport & Holt brief, p. 12).

The respondents argue that the case presents concurrent findings of fact which this Court will not disturb; but the so-called finding of fact is merely the acceptance of the master's testimony that the data which he had was sufficient, although he made no use of it and, admittedly, it did not satisfy the requirements either of the statute or of good seamanship (see passages from opinion below quoted on p. 23 of our principal brief). This finding presents a clear-cut question of law, *i. e.*, whether *The Pennsylvania* rule still stands in its original form, or whether it has been so reduced by later authority that it can now be met by a mere balance of probability, or by proof that compliance with the statute is unnecessary. Is it still necessary to prove that the violation of a statute "could not" have contributed to the disaster; or is it now sufficient to show that it "probably did not"?

The respondents wholly ignore the specific finding below that one of the factors which set the "Aakre" over to westward, where she went aground, was the failure of her navigators to allow for a material deviation of her compass (see our principal brief, pp. 22, 26, 27). In connection with this finding, the case presents two clear-cut questions of law:

(a) Can this contributing cause of the stranding be disregarded because other errors of navigation would probably have caused the stranding in any event? The lower courts found that it could be so disregarded.

(b) In view of the admitted fact that the navigators of the "Aakre" did not consult their compass book, at a time when they were seriously concerned about their position, and did not make even the allowance for deviation called for by the meager and incomplete data in that book, can anyone properly say, as was said in the lower Court, that—

> "even a fairly general deficiency in the records could not have been material to the stranding?"

This is a finding that because a navigator did not rely on an incomplete record, it necessarily follows that he would not have relied on a complete record.

Neither of these findings can be sustained under *The Pennsylvania* rule as laid down by this Court. Indeed, the Court below tacitly recognized that this was so, because the majority of the court took pains to say that *The Pennsylvania* rule as now enforced did no more than to shift the burden of proof. Judge FRANK was unable to accept this modification of the rule and criticized the majority opinion on that ground. He was of opinion that this rule placed upon a violator of a statutory mandate a much heavier duty, viz., that of showing that his violation of the statutory mandate *could not* have been the cause of the loss. The Circuit Court of Appeals in *The Denali*, 105 F. (2d) 413; affirmed on rehearing 112 F. (2d) 952, took the same view. The argument by respondents that the authority of *The Pennsylvania* is fully recognized in the Second Circuit, and that the present case involves only issues of fact, ignores the actual grounds of the decision below and merely tends to obscure the real issues presented to this Court.

That the rule of The Pennsylvania applies in the present case is established by the decisions of this Court.

This case, like the case of *Lie* v. *San Francisco and Portland S. S. Co.*, 243 U. S. 291, involves the navigation of a Norwegian vessel on the high seas. In the *Lie* case the rule which was violated had been adopted by statute both in the United States and in Norway (243 U. S. at p. 297). As a United States statute could have no application on the high seas, it seems clear that the Norwegian vessel was condemned under her own law, supplemented by the rules of evidence as applied in the United States courts.

The *Lie* case also answers the argument made by the respondent Continental Grain Company (at page 8 of its brief), that the Norwegian statute involved in this case is "directed to the officers and engineers of the ship and not to the vessel or owner." It would be difficult to think of any regulation which was directed more specifically to the officers of the vessel than the steering and sailing rules which were involved in the *Lie* case.

Respondents suggest that the navigation of the "Aakre" was governed by Canadian law. It is true that the form of the contract of affreightment was governed by Canadian law;* but just why the navigation of a Norwegian vessel on the high seas should be governed by Canadian law is not apparent to us. Even if this point be conceded, however, it makes no difference in the result. In the case of the *Richelieu & Ontario Nav. Co.* v. *Boston Insurance Co.*, 136 U. S. 408, the vessel was governed by Canadian law; but the presumption of fault was not, as suggested by the respondents, based on the Canadian statute. The Canadian statute provided:

> "In case any damage to person or property *arises from* the non-observance by any vessel or raft of any of the rules prescribed by this act, such damage shall be deemed to have been occasioned by the wilful default of the person in charge * * *" etc. 136 U. S. at page 422. (Italics ours.)

It is apparent that this provision does not apply until the question of causation has been decided; and it was in deciding this question that this Court cited and relied upon *The Pennsylvania.* See 136 U. S. at page 422.

The respondents go outside the findings of the lower courts and argue the case on the evidence.

Our petition is based solely on the findings of the lower courts and we have been careful not to discuss any issues of fact. We cannot, however, ignore some of the statements made by the respondents in their discussion of the evidence.

In their eagerness to show that this case turns on questions of fact, the respondents devote a considerable part of their argument to questions about which there has been no controversy since the evidence was closed. An example of this is the good mechanical condition of the compasses,

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* As pointed out in our principal brief (p. 19) the Canadian law on this subject is the same as our law.

which these petitioners have not questioned since the evidence on the subject was offered in the District Court. Petitioners' contention is not that the compasses themselves were in bad condition, but that the navigators did not have the necessary data to enable them to use the compasses accurately—*i. e.*, to show the extent of their deviation.

The respondents show a natural reluctance to discuss the actual findings below with respect to the deviation of the compass. Those findings were that, on the course on which she left St. John, the "Aakre's" compass had an easterly deviation of some 3°; that this deviation was material in amount and was a factor in setting the vessel to the westward where she went aground; but that this deviation can be disregarded because of other errors in navigation which, the court finds, would have put her aground in any event. Respondents ignore these findings and attempt to support the decision below on grounds different from and inconsistent with those adopted by the lower courts.

On the page of the compass book devoted to the point (Southwest) nearest the "Aakre's" course, there was only one entry within a year; but the lower courts held that this entry, showing a 3° easterly deviation, should have given the master sufficient information. The respondent Lamport & Holt, however, argues that this entry did not in fact show the true deviation of the compass on the course to which it related; but that a study of all the deviation data available, including the log-book entries, would have indicated that the deviation was less than 1° (Lamport & Holt brief, pp. 15, 16). If this argument is accepted it merely confirms that there was not available to the master, in condensed and convenient form, any reliable data as to the deviation of his compasses.

The same brief stresses the fact that the entries in the log-books show very few deviations in excess of three or four degrees. To appreciate the significance of these figures it is necessary to bear in mind that even where the deviations do not exceed 3° they range between 3° minus

and 3° plus—a range of 6°, or more than half a point. The argument that these deviations are of no significance must be considered in connection with the finding by the Circuit Court of Appeals (quoted on page 23 of our principal brief) that "all the expert witnesses and the court itself seemed to agree" that good practice requires any change of as much as one degree in the deviation to be entered in the compass book.

The argument that the *average* deviation was very small is particularly misleading. If there were a deviation of 3° plus yesterday and 3° minus today, the average deviation would be zero; but no one would argue that a shift of 6° in the deviation was unimportant.

The shipowner argues that the compass was of no consequence because the captain did not intend to rely upon it anyway, but intended to navigate by radio bearings. Even when accurate, however, radio bearings merely enable a vessel to fix her position at any given time; they do not guide her from that position to another. A vessel can only set a course by her compass; and if the deviation of the compass is not accurately known she cannot lay an accurate course.

The District Court found the place of stranding was more than 44 miles from the departure buoy outside St. John Harbor (R. 1395); and that the drift of the "Aakre" during the period of some three hours while her engines were stopped was only 5 miles (R. 1399). It is obvious, therefore, that all but a very small percentage of the "Aakre's" progress from her point of departure to the point of stranding was brought about by her own motive power, propelling her along courses laid necessarily by her own compasses. The "Aakre" never obtained a radio cross-bearing until about half an hour before the stranding (opinion of District Court, R. 1391). In fact, the District Court criticizes the "Aakre's" navigators for not having obtained such a cross-bearing earlier (R. 1389-1390), although the only evidence on the point (given by

the ship's own radio operator) is that no such cross-bearing was then obtainable (R. 402, 403).

The foregoing facts show the complete fallacy of the argument that the "Aakre" was navigating by some strange method that did not involve the use of her compass. We have been forced to refer to the evidence because the respondents have chosen to argue the case on questions of fact instead of meeting the clear-cut issues of law presented by the petition.

Importance of the case.

The Continental Grain Company (p. 11 of its brief) argues that this case is not important because—

> "A case involving similar facts would rarely happen again."

and because—

> "No loss of life is involved."

As to the first reason: the present case is important not because of its particular facts, but because of the question of principle involved,—*i. e.*, whether a statutory mandate concerning safety of navigation may be ignored, and a shipowner may be excused for such conduct merely upon the ground that the master of the vessel substituted an entirely different method of avoiding marine disasters in place of that provided by the statute.

As to the second reason: surely it is unnecessary that lives should actually be lost in order to emphasize the importance of the precautions by which they might have been saved.

Dated, New York, December 1, 1941.

Respectfully submitted,

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T. Catesby Jones,
F. Herbert Prem,
Proctors for Petitioners.